In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK of Worcester, a corporation,

Appellant,

IN RE ESTATE OF JULIA A. LEONARD.

STATEMENT OF BASIS OF JURISDICTION.

NEWTON D. BAKER,
Attorney for Petitioner and Appellant.

B. F. PERRY,
Of Counsel.

WM. T. FORBES,
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IN RE ESTATE OF JULIA A. LEGNARD.

STATEMENT OF BASIS OF JURISDICTION.

I.

STATUTORY PROVISION UPON WHICH JURISDICTION IS PREDICATED.

The jurisdiction of the Supreme Court on this appeal from the final judgment of the Probate Court of Worcester County, Commonwealth of Massachusetts, is invoked under Section 237-(a) of The Judicial Code, U. S. C. A. Title 28, Chapter 9, Sec. 3441, of which the pertinent provision reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; * * * may be reviewed by the Supreme Court * * *."

II.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED AND OF APPEAL THEREFROM.

The final judgment upon which this appeal is taken was entered in the Probate Court of Worcester County, Massachusetts, pursuant to the directions contained in a rescript from the Supreme Judicial Court of Massachusetts on June 14, 1928. (Unprinted Record 10.) The Appellant presented its petition for appeal from said final judgment to the first presiding Judge of the Probate Court of Worcester County, Massachusetts, on September 12, 1928, and the appeal was allowed on the same day (Unprinted Record 33-38).

III.

THE NATURE OF THE CASE AND OF THE RULINGS BELOW WHICH BRING IT WITHIN THE JURISDICTIONAL PROVISION INVOKED.

On March 17, 1926, the Fitchburg Bank & Trust Company, a corporation organized under the laws of the Commonwealth of Massachusetts, filed its petition for appointment as Executor under the Will of Julia A. Legnard. (Unprinted Record 6.) On the same day the Fitchburg Bank & Trust Company filed its bond without surety with the Probate Court for the County of Worcester in the sum of Seven Thousand Five Hundred Dollars ($7,500.00). (Unprinted Record 8.) This bond was approved by the Probate Court on April 21, 1926, at which time the Probate Court appointed the Fitchburg Bank & Trust Company Executor of the Last Will and Testament of Julia A. Legnard. (Unprinted Record 9.)

The Will of Julia A. Legnard, after making certain specific bequests, devised the residue of her estate to the Fitchburg Bank & Trust Company, in trust, and appointed

the Fitchburg Bank & Trust Company sole Executor of the Will. (Unprinted Record 4.)

The Merchants National Bank of Worcester, a national bank organized under the laws of the United States and located in the City and County of Worcester, Commonwealth of Massachusetts, and the Fitchburg Bank & Trust Company, located in the County of Worcester, Commonwealth of Massachusetts, were consolidated June 27, 1927 under the charter of The Merchants National Bank of Worcester and under the corporate title of "The Worcester County National Bank of Worcester," as certified to by the Comptroller of the Currency. (Unprinted Record 12-13.) This consolidation was had under the provision of the Act of Congress to further amend the National Banking laws and The Federal Reserve Act and for other purposes approved February 25, 1927, Chapter 191, Sec. 3, 44 U. S. Statutes at Large, Part 2, 1224, 1225 (McFadden Act) amending the Act approved November 7, 1918, Chapter 209, Sec. 2, 40 U. S. Statutes at Large 1044. The portion of the foregoing Statute which was held unconstitutional and void by the Supreme Judicial Court of Massachusetts reads:

> "And all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal and mixed and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interest *including the right of succession as trustee, executor, or in any fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association.*"

On February 11, 1928, The Worcester County National Bank of Worcester, as successor to said Fitchburg Bank & Trust Company, Executor, filed its First and Final Account and Petition for its allowance as Executor of the Last Will and Testament of Julia A. Legnard with the Probate Court for Worcester County, Commonwealth of Massachusetts. (Unprinted Record 10.) This account is for the period beginning the 21st day of April A. D. 1926 and ending with the 9th day of February A. D. 1928. The account is rendered by The Worcester National Bank of Worcester for the Fitchburg Bank & Trust Company to June 27, 1927, and thereafter as its own account. (Unprinted Record 10.)

Under date of February 15, 1928, the Judge of the Probate Court for Worcester County reported his finding of the material facts in a reservation to the Supreme Judicial Court of Massachusetts, requesting an opinion "as to whether the petitioner is entitled to render said account." (Unprinted Record 11-13.)

The Probate Court specifically found that the account was "in proper form for allowance and should be allowed as rendered if the said The Worcester National Bank, as successor or otherwise, is Executor of said Will, or has the right to render said account under the laws of the United States." The Court found that the Fitchburg Bank & Trust Company and The Merchants National Bank of Worcester were consolidated June 27, 1927 under the corporate title of "The Worcester County National Bank of Worcester" and that the accountant and appellant had continuously had permission since March 24, 1915 to act as Executor under the provisions of Sec. 11-K of the Act of Congress, approved December 23, 1915, and known as The Federal Reserve Act. (Unprinted Record 12-13).

The Supreme Judicial Court for the Commonwealth of Massachusetts under date of May 24, 1928, directed the

following rescript to the Probate Court for Worcester County answering the question reserved, as follows, to-wit:

> "The question reported, namely, 'whether the petitioner is entitled to render said account' is answered in the negative. Probate Court instructed accordingly." (Unprinted Record 14.)

The Supreme Judicial Court further stated:

> "The reasons of the decision are set forth at length in the Opinion, filed with the Reporter of Decisions, to which reference is made." (Unprinted Record 15).

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts was rendered by Chief Justice Rugg. (Unprinted Record 16-32, incl.)

In deciding the case the Supreme Judicial Court of Massachusetts construed the Act of Congress approved on February 25, 1927, Chapter 191, Sec. 3, 44 U. S. Statutes at Large 1244-1245, amending the Act approved December 7, 1918, Chapter 209, Sec. 2, 40 U. S. Statutes at Large 1044, as unconstitutional. The Court held:

> "We feel compelled to reach the conclusion that this clause of said Sec. 3, Chapter 191, Act of Congress, approved February 25, 1927, here under discussion, is unconstitutional", (Unprinted Record 30),

and further:

> "The final determination based upon all branches of this judgment is that the Act of Congress of February 25, 1927, Chapter 191, Sec. 3, as we have interpreted its meaning and with the clause requiring the Courts of this Commonwealth to recognize the National Bank as holding without new appointment the fiduciary position held by the Trust Company (is) stricken down as unconstitutional * * *". (Unprinted Record 31).

Pursuant to the rescript of the Supreme Judicial Court, the Probate Court for Worcester County entered final judgment in this case on the 14th day of June, 1928, as follows, (Unprinted Record 10) to-wit:

> "The foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court), and pursuant to the terms of said rescript, it appearing that The Worcester County National Bank of Worcester, Accountant and Petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as Executor of the Will of said Testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed."

IV

CASES CITED TO SUSTAIN JURISDICTION OF THIS COURT.

A.

The judgment from which this appeal is taken is a final judgment in the highest court of the State of Massachusetts in which a decision in this case could be had and appeal is properly taken from the Probate Court.

Under the provisions of the General Law, 1921, Chapter 211, a judgment entered in an inferior court of that State, pursuant to a rescript from the Supreme Judicial Court constitutes a final decree and is not appealable. *Boston, Petitioner*, 223 Mass. 36 and Cases cited.

Under that practice the judgment of the inferior court is regarded as the final decision of the highest court of the State of Massachusetts in which a decision could be had and the writ to or appeal from such decision is properly directed to the inferior court. *Davis vs. Cohen*, 268 U. S., 638, 639; *Myers vs. International Trust Company*, 273 U. S., 380, 381. This conclusion is further strength-

ened in this case by the fact that the Supreme Judicial Court of Massachusetts holds that an Executor has no such personal interest in his office as enables him to appeal from an order of the Probate Court removing him. *Hayden vs. Keown*, 232 Mass. 259, 122 N. E. 264, 265, 266.

We also invite the attention of the Court to:

Kentucky vs. Power, 201 U. S. 1;
McDonald vs. Massachusetts, 18 U. S., 311;
Gregory vs. McVeigh, 90 U. S., 311.

B.

Since the final judgment in this case holds, as the basis of the judgment, that a Statute of the United States is invalid, the judgment is appealable to this Court.

Since the final judgment of the highest court of the State of Massachusetts in which a decision in this particular suit could be had holds that a Statute of the United States is invalid, the party aggrieved has the right to invoke the appellate jurisdiction of this Court under Section 237 (a) of the Judicial Code. *Longest vs. Langford*, 274 U. S., 499; *Jones National Bank vs. Yates*, 240 U. S., 541. While the jurisdiction of this Court was formerly invoked by writ of error in such cases, it is now invoked by appeal under the provisions of the Act of January 31, 1928, Chapter 8, Secs. 1 and 2.

V.

NOTICE TO APPELLEE.

Since there are no objections to the petition or account of the appellant, there are no appellees to serve under the Massachusetts practice followed in this case. In lieu thereof and to comply with the rules of this Court as far as the facts would permit, notice was served upon Honorable Frederick H. Chamberlain, First Judge of the Pro-

bate Court of Worcester County, and on Honorable Joseph E. Warner, Attorney General of the Commonwealth of Massachusetts (Unprinted Record 39, 40). This Statement of the Basis of Jurisdiction on this appeal is likewise being served upon them.

The case was docketed with this Honorable Court on the 25th day of September, 1928.

Respectfully submitted,

NEWTON D. BAKER,

Attorney for Petitioner and Appellant.

B. F. FIERY,

Of Counsel.

WM. T. FORBES,

Of Counsel.

In the

Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER,
Appellant.

MOTION OF ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AND TO MAKE ORAL ARGUMENT IN SUPPORT OF DECISION BELOW.

BRIEF OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IN HIS OWN BEHALF, IN BEHALF OF THE SAID COMMONWEALTH, AND IN BEHALF OF THE FIRST JUDGE OF PROBATE OF THE COUNTY OF WORCESTER IN SAID COMMONWEALTH.

JOSEPH E. WARNER, *Attorney General,*
F. DELANO PUTNAM, *Assistant Attorney General,*
R. AMMI CUTTER, *Assistant Attorney General,*
Of the Commonwealth of Massachusetts.

In the
Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 469.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER, *Appellant.*

MOTION OF THE ATTORNEY GENERAL OF MASSACHUSETTS FOR LEAVE TO FILE A BRIEF AND MAKE AN ORAL ARGUMENT IN THIS COURT IN SUPPORT OF THE STATE COURT DECISION FROM WHICH THIS APPEAL IS TAKEN.

Now comes Joseph E. Warner, Attorney General of the Commonwealth of Massachusetts, and respectfully represents as follows:

1. This is an appeal by a national bank from a decree of the Probate Court of Worcester County, Massachusetts (entered in consequence of a decision of the highest court of that state), denying to said national bank the right to file an account as alleged executor under the will of one Legnard.

2. In very brief form the question of law to be decided by this Honorable Court is the following: Must the Probate Court of Worcester County, Massachusetts, having appointed the Fitchburg Bank and Trust Company (a state bank) executor of the will of a certain person, thereafter accept automatically and without any further Probate

Court proceedings an account rendered by the Worcester County National Bank of Worcester as such executor, solely because, after its appointment as executor, the Fitchburg Bank and Trust Company merged with the Merchants National Bank of Worcester under the latter's charter and under the name of Worcester County National Bank of Worcester? Said merger was in accordance with the provisions of Act of February 25, 1927, c. 191, §1 (44 STAT. AT L., pt. 2, 1224-1225), the material portions of which are as follows:

> "That any bank incorporated under the laws of any State . . . may be consolidated with a national banking association located in the same county . . . under the charter of such national banking association . . . and all the rights, franchises, and interests of such State . . . bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests *including the right of succession as trustee, executor, or in any other fiduciary capacity* in the same manner and to the same extent as was held and enjoyed by such State . . . bank so consolidated with such national banking association. . . ." (Italics ours.)

The state courts answered this question of law in the negative. *Worcester County National Bank of Worcester, petitioner*, 162 N.E. 217; 1928 Mass. Adv. Sh. 1213.

3. Owing to the form in which this litigation arose in the state court, the only party of record therein is the

national bank. All persons interested in the account have assented to its allowance (R. 11), so that there is no party now before this Court who can be heard in support of the state court decision which is here attacked. The decision involves a matter of great importance to Massachusetts and to other States which permit the appointment by Probate Courts of banking corporations to fiduciary positions.

Wherefore said Joseph E. Warner, Attorney General as aforesaid, respectfully moves this Honorable Court for leave to file the accompanying brief and make an oral argument in support of said state court decision, and, in the alternative, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae* in support of said state court decision.

JOSEPH E. WARNER,
Attorney General of Massachusetts.
FRANKLIN DELANO PUTNAM,
Assistant Attorney General of Massachusetts.
RICHARD AMMI CUTTER,
Assistant Attorney General of Massachusetts.

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EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER, *Appellant.*

BRIEF OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IN HIS OWN BEHALF, IN BEHALF OF THE SAID COMMONWEALTH, AND IN BEHALF OF THE FIRST JUDGE OF PROBATE OF THE COUNTY OF WORCESTER IN SAID COMMONWEALTH.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED BELOW.

The case was heard on appeal (R. 14) by the Supreme Judicial Court for the Commonwealth of Massachusetts prior to the entry of final decree after rescript (R. 10) in the Probate Court for the County of Worcester. The opinion of the Supreme Judicial Court (R. 15-30) is officially reported in 1928 Massachusetts Advance Sheets, p. 1213, and in 263 Massachusetts Reports, at a page at present not available. See also 162 N.E. 217.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The appellant, in accordance with paragraph 1 of Rule 12 of the Revised Rules of this Honorable Court, duly filed a statement disclosing the alleged basis of the jurisdiction of this Court; to wit, that the final decree after rescript of the Probate Court for the County of Worcester (the highest court in the Commonwealth of Massachusetts in which a final decision in this cause could be had) was against the validity of a portion of section 1 of the Act of Congress approved February 25, 1927 (c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225).

This Honorable Court, on December 3, 1928, announced that it had found that probable jurisdiction had been shown by the appellant. See Judicial Code, §237 (*a*), as amended by Act of February 13, 1925, c. 229, 43 STAT. AT L., 936, 937. Counsel here make no contention that this Honorable Court has not jurisdiction to review the final decree of the Probate Court for the County of Worcester in this cause. In view of the provisions of Rule 27, art. 2, cl. (*c*), of the Rules of this Honorable Court, we deem no further statement as to jurisdiction to be necessary here.

STATEMENT OF THE CASE.

By the last will of Julia A. Legnard (R. 2), late of Fitchburg, Worcester County, Massachusetts, dated January 12, 1926, the Fitchburg Bank and Trust Company was nominated (R. 3) sole executor. Julia A. Legnard died on March 14, 1926 (R. 4). Upon suitable petition (R. 4) the Probate Court for the County of Worcester, by decree entered April 21, 1926 (R. 5), appointed said Fitchburg Bank and Trust Company of Fitchburg as executor of the will of the testatrix. The Fitchburg Bank and Trust Company duly qualified as executor by giving bond (R. 5-6, 11-12).

Subsequent to its appointment and qualification as such executor, the Fitchburg Bank and Trust Company and the Merchants National Bank of Worcester, a national bank organized under the laws of the United States and located in Worcester, were consolidated on June 27, 1927, under the charter of the Merchants National Bank of Worcester and under the new corporate title of the Worcester County National Bank of Worcester (R. 12). The consolidation took place in purported compliance with the provisions of the Act of Congress of February 25, 1927, §1, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225; U.S. Code, tit. 12, c. 2, §34*a*, which reads:

> "*Consolidation of state bank, etc., with national bank; capital stock; dissenting shareholders.* Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such

paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association. When such consolidation shall have been effected and approved by the comptroller any shareholder of either the association or of the State or District bank so consolidated, who has not voted for such consolidation, may give notice to the directors of the consolidated association within twenty days from the date of the cer-

tificate of approval of the comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this section; and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

> "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

Said consolidation was duly approved by the Comptroller of the Currency (R. 13). No change in the administration of the estate of Julia A. Legnard appeared upon the records of the Probate Court for the County of Worcester, unless the filing of a copy of the certificate of the Comptroller of the Currency approving the consolidation of these banks constituted such a change (R. 12).

On February 11, 1928, the Worcester County National Bank of Worcester (the new consolidated bank) filed what purported to be the first and final account (R. 8-9) of the Fitchburg Bank and Trust Company, as executor of the said will of Julia A. Legnard, for an accounting period beginning April 21, 1926, and ending February 9, 1928. The account bore upon its face (R. 10-11) a statement that "this account is rendered by the Worcester County National Bank of Worcester for said Bank and Trust Company to June 27, 1927, and thereafter as its own account," and was signed "Worcester County National Bank of Worcester by C. A. Evans, Vice President and Trust Officer, successor to the Fitchburg Bank & Trust Company" (R. 11). The First Probate Judge for the County of Worcester found (R. 12) that the account was in proper form for allowance, and should be allowed as rendered if the said Worcester County National Bank, as successor or otherwise, is executor of said will or has the right to render said account. Without action on the said account (R. 13), the Probate Judge reported the above facts and the question of law involved for the determination of the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts (R. 10-14), for decision of the question

whether the petitioner (the appellant in this Court) was entitled to render said account. On May 24, 1928, by a rescript (R. 14), accompanied by an opinion (R. 15-30), the Supreme Judicial Court instructed the Probate Court that the petitioner was not entitled to render said account. Thereafter, on June 14, 1928, the Probate Court for the County of Worcester entered a final decree after rescript (R. 10) dismissing the petition for allowance of the account. No appeal to any state court lies from this decree, and the Probate Court for the County of Worcester is, therefore, under the law of the Commonwealth of Massachusetts, the highest state court in which a final decision in this cause could be reached. The appellant bank duly filed a petition for an appeal to this Honorable Court (R. 31), assigning errors in the action of the Supreme Judicial Court of the Commonwealth in instructing the Probate Court to dismiss the petition for the allowance of the account and in the action of the Probate Court in obeying the rescript of the Full Court of the Supreme Judicial Court (R. 31-33). The appeal was duly allowed upon the filing of bond, without surety, in the sum of one hundred dollars (R. 33).

ANALYSIS OF OPINION OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The opinion of the Full Court of the Supreme Judicial Court of Massachusetts was based upon the following chain of reasoning:

1. Although the statutes of Massachusetts do not affirmatively authorize the consolidation of a trust company organized under Massachusetts laws with a national bank, such a consolidation (as authorized by §1 of the Act of Congress of February 25, 1927, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225) is not in and of itself in contravention of the laws of Massachusetts (R. 16-19).

2. The consolidation authorized by said section (*supra*, p. 3) results in the termination of the Fitchburg Bank and Trust Company as a corporate entity created by the laws of Massachusetts capable of transacting business. The consolidated bank is a national bank existing solely by virtue of the charter of the pre-existing national bank party to the consolidation (R. 19-21). The trust company, as a corporate person having individual corporate identity, ceased to exist upon the consummation of the consolidation.

3. Since the corporate identity of the Fitchburg Bank and Trust Company terminated at the time the consolidation took place, its identity as a fiduciary appointed by the Probate Court has been extinguished. Whatever may be the rights, obligations, privileges, immunities, and duties of the consolidated national bank with respect to the ordinary commercial and contractual interests of the Fitchburg Bank and Trust Company, they do not extend to any continuation of the fiduciary interests and duties of the trust company without further action by the Court appointing the trust company as fiduciary. Executors are officers of the Probate Court appointed by the Court in the exercise of its judicial function, as the result of a determination of fitness required by the laws of Massachusetts. In view of the highly personal nature of the trust, the Worcester County National Bank cannot be said to be the executor originally appointed (R. 21-24).

4. Said section (Act of Congress of February 25, 1927, §1, c. 191, §3, 44 STAT. AT L., pt. 2, 1224, 1225), in so far as it provides that the consolidated bank, a national banking association, shall enjoy "the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State . . . bank," is by its clear language an attempt by Congress to require the Probate Court to recognize the consolidated bank as the executor originally appointed, de-

spite the many substantial changes in corporate aspect and personality wrought by the consolidation (R. 24-25).

5. Said section (*supra*, p. 3) as thus construed is in contravention of the law of Massachusetts, inasmuch as it purports to compel the Probate Court to recognize as a fiduciary without new judicial proceedings a corporation different from the corporation originally appointed as such fiduciary (R. 25-27).

6. Said section (*supra*, p. 3) as thus construed (R. 24-25; *supra*, p. 8) is unconstitutional because—

(*a*) it results in the exercise of a judicial function by a legislative body;

(*b*) it constitutes action by Congress outside the scope of its constitutional powers, *i.e.*, by a direct regulation of the administration of estates, clearly a matter within the exclusive jurisdiction of the States;

(*c*) it constitutes Congressional action which goes far beyond any safeguard required to prevent discrimination against national banks in favor of competing state banks (R. 27-29).

7. The purpose of the provision of said section, thus held invalid, is subordinate to the main purpose of the section (which is to provide an easy method of effecting direct consolidations of state banks and national banks). The invalid portion of the section is, therefore, separable (R. 29).

8. The consolidation effected in pursuance of the section is not in contravention of the law of Massachusetts. The consolidation, because of the unconstitutionality of a portion of the section, does not have the effect of entitling the consolidated bank to succeed to the position of executor held previously by the Fitchburg Bank and Trust Company, without petition to the Probate Court by the new consolidated national bank (the appellant) for appointment to the fiduciary position of administrator *de bonis*

non cum testamento annexo of the estate of Julia A. Legnard, late of Fitchburg (R. 30).

POINTS AND AUTHORITIES.

I.

THE ACT OF FEBRUARY 25, 1927, §1 (44 STAT. AT L., PT. 2, 1224, 1225), REQUIRES ONLY THAT A NATIONAL BANK, WITH WHICH A STATE BANK OR TRUST COMPANY HAS BEEN CONSOLIDATED UNDER THE PROVISIONS OF THE ACT, BE APPOINTED AS SUCCESSOR TO THE STATE BANK AS FIDUCIARY IN ACCORDANCE WITH THE RULES OF STATE LAW APPLICABLE TO SUCH APPOINTMENTS. SO LONG AS THE STATE LAW APPLICABLE TO THE APPOINTMENT OF SUCCESSOR FIDUCIARIES PROVIDES FOR THE APPOINTMENT OF CONSOLIDATED NATIONAL BANKS AS SUCCESSOR IN THE SAME MANNER AND UPON THE SAME TERMS AS CONSOLIDATED STATE BANKS, THE STATE LAW AND §1 OF THE ACT OF FEBRUARY 25, 1927, ARE NOT IN CONFLICT.

A. *A Construction of §1 of the Act of February 25, 1927, should be Avoided, which would Render a Portion of the Section of Doubtful Constitutionality.*

The Chief Justice of the Supreme Judicial Court of Massachusetts construed section 1 of the Act of February 25, 1927 (quoted, *supra*, p. 3), as purporting to require the Probate Courts of a State to recognize a national bank with which a state bank or trust company had been consolidated (as authorized by the act) as successor as fiduciary to the state bank or trust company in all fiduciary positions to which the state bank had previously been appointed by the Probate Court. The Chief Justice indeed construed the act to require the recognition of the consolidated bank as successor fiduciary without further action by the Probate Court, even though the law of Massachusetts provided that a successor fiduciary should be appointed only after peti-

tion to the Court by the candidate for appointment as successor, and after determination by the Court (as a matter of judicial inquiry) that the candidate was a suitable person for the position of successor fiduciary (R. 24-25; see analysis of opinion, *supra*, p. 8). This construction was the one contended for by the present appellant (petitioner below) in its brief and argument before the Supreme Judicial Court of Massachusetts and it is apparently its interpretation of the construction taken by the Comptroller of the Currency in an opinion, quoted extensively in the brief below. (See opinion of Comptroller of the Currency, dated March 22, 1927, published Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 267-271). There was no argument or brief in the Supreme Judicial Court for any respondent. [The persons here represented made no request to be heard as parties in interest in the proceedings in the state court.] The Supreme Judicial Court did not have at its disposal argument in favor of any other construction of section 1 of the Act of February 25, 1927 (quoted, *supra*, p. 3. This section amends the Act of November 7, 1918, by inserting a new section, section 3 thereof. The section is referred to in the opinion of the Supreme Judicial Court of Massachusetts as section 3). Despite the exhaustive examination by the Court of the pertinent authorities, it is submitted with great deference that the construction by the Court of section 1 was incorrect. Inasmuch as the statute construed is an Act of Congress, it is obvious that this Honorable Court is not bound by the construction taken by the Supreme Judicial Court of Massachusetts.

Pacheco v. *N.Y., N.H. & H. R. Co.*, 15 F. (2d) 467, 468 (C.C.A. 2d).
Knight v. *Carter Oil Co.*, 23 F. (2d) 481, 484.

As we have stated above (*supra*, p. 9), the Supreme Judicial Court, having thus construed the statute, held

that section 1 was in violation of the Constitution of the United States in so far as it required a state court without a new judicial determination to recognize as a trustee or other successor fiduciary a consolidated national bank in place of a trust company originally appointed to the trust by the Court. It is, of course, necessary for this Honorable Court to review the correctness of the decision of the Massachusetts Court on the question of constitutionality, if this Court adopts the construction of section 1 taken by the Massachusetts Court. In view of the decision below, it must be said at least that there is grave doubt as to the constitutional validity of a portion of section 1 as construed by the Supreme Judicial Court. We submit, therefore, that this Court should be astute to adopt (as between a statutory construction which raises strong doubts as to the constitutionality of an act of Congress and another construction which renders the statute unquestionably valid) the construction which leaves no room for any holding or argument that the legislative department has exceeded its powers.

Richmond Screw Anchor Company v. *United States*, 275 U.S. 331, 346.
Blodgett v. *Holden*, 275 U.S. 142, 148.

It is the contention of these respondents that section 1, as applicable to this case, should be construed so as—

(1) To permit the Probate Court to exercise a judicial determination in the particular case before it as to the fitness of the consolidated national bank to succeed as fiduciary a state trust company which has been consolidated with the national bank under section 1;—that is, in this case, to permit the Worcester County Probate Court to decide whether the Worcester County National Bank of Worcester is a fit and suitable person to succeed the Fitchburg Bank and Trust Company as executor of the will of Julia A. Legnard.

(2) To permit the Probate Court to decline to acknowledge as fiduciary or as its officer a consolidated national bank, where such a bank has not applied for appointment as fiduciary to succeed a state trust company in accordance with the requirements of state law as to all successor fiduciaries;—that is, in the case at bar, to permit the Probate Court of Worcester County to decline to recognize the Worcester County National Bank of Worcester as executor in the place of the Fitchburg Bank and Trust Company, inasmuch as the appellant has not applied for appointment as administrator *de bonis non cum testamento annexo* in the place of said trust company.

(3) To permit the state Probate Court to visit upon a consolidated bank the consequences (imposed by state law) of dealing with the assets of an estate in process of administration and therefore assets *in custodia legis* without being a fiduciary appointed and authorized by the Court so to do;—that is, in the case at bar, to permit the Worcester Probate Court to refuse to allow the appellant national bank to account as *executor*. It is the contention of the Commonwealth that the appellant should be permitted to account only as executor *de son tort*, as would be the case if any other person (whether individual or corporation) improperly and without authority intermeddled with the assets of the estate.

B. *The Language and Legislative History of Section 1 of the Act of February 25, 1927, does Not Indicate that Congress Intended to Authorize Consolidated National Banks to Succeed State Trust Companies as Fiduciaries without New Appointment by the Probate Court, where State Law Requires such New Appointment.*

1. *The Legislative History of Section 1 of the Act of February 25, 1927, Shows that it was Intended only to Simplify the Procedure Attendant upon the Consolidation of State and National Banks.*

The Act of February 25, 1927 (44 STAT. AT L., pt. 2, 1224, 1225), with section 1 of which this case is concerned, was designed to provide for consolidations of state banks and national banks under the charter of a national bank and purported "to amend an Act entitled 'An Act to provide for the consolidation of national banking associations' approved November 7, 1918." The general purpose of the bill (69th Congress, 1st Sess., H.R. 2) is explained fully in the report made by the chairman of the House Committee on Banking and Currency in behalf of the committee (69th Congress, 1st Sess., House of Representatives, Report No. 83, January 12, 1926) in the following language:

> "Every section of the bill is an amendment of the national bank act itself or of provisions of the Federal reserve act which relate to national banks. The general purpose of the bill is to adjust the national banking laws to modern banking conditions along the lines of conservative banking, and without any deviation from the high standard which has been set by the national banking system. Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within recent years. Other sections of the

bill affirm and regulate practices which have grown up within the national banking system under the exercise of incidental corporate powers. These practices are common to both the State and national banks. Other sections of the bill relate entirely to questions of procedure and not to banking powers. An attempt is made to eliminate some of the rigid formalities in this direction. Several sections of the bill declare a Federal Governmental policy with reference to branch banking. A detailed analysis section by section follows:

"Section 1: This section relates to a question of procedure. It adds no new power to the national banks. It provides that a State bank may consolidate directly with a national bank under the national charter. The same result can now be accomplished through the State bank first converting into a national bank and then consolidating with another national bank. Consequently, the effect of the section is to eliminate delay and expense in accomplishing a result which is already provided for by law."

It is a fair statement of the situation to say that the portions of the act, as finally approved, dealing with branch banking received by all odds the most attention from the Congress in committee and in debate. The questions of policy involved in that respect were fully discussed to the practical exclusion of discussion of the portions of section 1 of the bill pertinent in this case. As stated in the committee report just quoted, section 1 was primarily for the purpose of simplifying procedure in the consolidation of state banks with national banks under the charters of the latter; and it is submitted that no startling disregard of fundamentals of state law with respect to the administration of estates by state courts can be read into the Con-

gressional intention as revealed by the words of the act or its legislative history.

The precise words of section 1 of the Act of February 25, 1927, over which this case is fought, are the following (lines 30 to 41 on page 1225 of the act as printed in 44 STAT. AT L., pt. 2):

30 ". . . . . and all the rights, franchises,
31 and interests of such State or District bank so consolidated with a
32 national banking association in and to every species of property,
33 real, personal, and mixed, and choses in action thereto belonging,
34 shall be deemed to be transferred to and vested in such national
35 banking association into which it is consolidated without any deed
36 or other transfer, and the said consolidated national banking asso-
37 ciation, shall hold and enjoy the same and all rights of property,
38 franchises, and interests *including the right of succession as trustee,*
39 *executor, or in any other fiduciary capacity* in the same manner and
40 to the same extent as was held and enjoyed by such State or District
41 bank so consolidated with such national banking association."

The italicized language (italics ours) in the quotation above did not appear in the original bill, nor was it in the bill as reported by the House Committee on Banking and Currency on January 12, 1926 (*Congressional Record*, vol. 67, pt. 2, p. 1935; see House Report, No. 83, 69th Congress, 1st Sess.). The italicized language did not appear in the bill as reported with amendments by Senator *Pepper* for the Senate Committee on Banking and Currency on March 25, 1926 (*Congressional Record*, vol. 67, pt. 6, p. 6215; Senate Report No. 473, 69th Congress, 1st Sess.). The language first appears in an amendment offered in behalf of the Senate Committee on Banking and Currency by Senator *Edge* from the floor of the Senate on May 12, 1926, when the Senate Committee report with amendments was considered. The following took place at that time (*Congressional Record*, vol. 67, pt. 8, p. 9288), the amendment being approved without discussion.

> "Mr. Edge. Mr. President, on behalf of the committee I desire to offer an amendment at this point.

"The Presiding Officer. The amendment will be stated.

"The Chief Clerk. On page 3, line 18, after the word 'interests,' it is proposed to insert the following: including the right of succession as trustee, executor, or in any other fiduciary capacity.

"Mr. Edge. Mr. President, this amendment is merely to clarify the section and make its intent easier to understand.

"The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from New Jersey on behalf of the committee.

"The amendment was agreed to."

This amendment of the Senate (numbered 5 in the reprint of the amended bill, as returned to be printed with Senate Amendments on May 14, 1926, to the House of Representatives, *Congressional Record*, vol. 67, pt. 9, p. 9450, and thereafter referred to as No. 5 in the *Congressional Record*), was mentioned thereafter with comment only twice in the *Congressional Record* so far as we have been able to discover:

(*a*) The House members of a conference committee of the two houses on H.R. 2, the bill in question, in a statement annexed to the conference report filed June 22, 1926 (*Congressional Record*, vol. 67, pt. 11, pp. 11,765-11,766), said, as to amendment No. 5:

"On No. 5: The Senate amendment provides that in case of a consolidation of a national bank with a State bank that the consolidated bank should enjoy, among other property rights, franchises, and interests of the constituent banks, the right of succession as trustees, executors, or in any other fiduciary capacity. The House bill had no provision on the subject and the House recedes."

(*b*) Mr. McFadden, in commenting on the conference report in behalf of the House Committee in debate (*Congressional Record*, vol. 67, pt. 11, p. 11,767), said:

> "Amendment No. 5 clarifies the language of the House bill as to the right of a consolidated bank to act as trustees, etc."

It is hard to find in the language of the section inserted by Senate Amendment No. 5, when read in the light of this statutory history, any expression of a legislative intention making inapplicable to consolidated national banks the requirements of the laws of the several States with respect to the appointment by Probate Courts of executors and trustees or of successors to fiduciaries already appointed. In fact, every provision of the Act of February 25, 1927, reveals a clear desire on the part of Congress to refrain from interfering with provisions of state law beyond making provision for the conduct of the banking business by national banks (including those with which state banks have been consolidated) on terms of even competition with state banks authorized by law to do a similar business. There is no apparent intention that national banks (whether or not parties to a consolidation with state banks) shall have greater privileges than their state bank competitors; nor does it appear that Congress (assuming that it has the power to do so) intended to deny to state courts the power to regulate the fiduciary business conducted by a national bank, where such state court had the power under state laws to pass upon the conduct by a state bank or trust company of fiduciary business under similar circumstances.

2. *The Language of the Whole of Section 1 of the Act of February 25, 1927, Indicates that Congress did Not Intend that the Consolidation Authorized by Section 1 should Result in Any Violation of State Laws.*

Evidence of a deferential regard for state laws, enacted within the scope of the constitutional powers of state legislatures, is to be found in the whole statute. The following language of the act is referred to as indicating the general legislative intention, in the light of which the language here under consideration should be construed under the long-established rule that the intention of the lawmaker is to be deduced from a view of every material part of the statute.

Hellmich v. *Hellman*, 276 U.S. 233, 237.

(*a*) Express provision is found in section 1 of the Act of February 25, 1927, that no consolidation taking place under the provisions of the section "shall be in contravention of the law of the State in which such bank is incorporated" (44 STAT. AT L., pt. 2, p. 1226). Here Congress deliberately limits the operation of the most important feature of the section to consolidations in which the state banks concerned are permitted to participate under the law of their State. Such a limitation is in accord with the general intention (which we contend is apparent in the statute) that general provisions of state law were not to be set aside in order to carry out the purpose of the act.

(*b*) The express provision of section 1 (44 STAT. AT L., pt. 2, p. 1225, top) that a consolidation shall be approved by the vote of two thirds of the stockholders of the state bank involved "or by a greater proportion of such capital stock of such State bank if the laws of the State where the same is organized so require," is consistent with the general intention which we claim exists.

(*c*) Provision for notice to stockholders of the state bank of meetings is made by section 1 in close conformity with

the applicable provisions of state law, and then out of excess of deference for the provisions of state law is added, —"but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized."

(*d*) Liquidation of shares of stock of a state bank is by section 1 to "be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as" provided in the section (44 STAT. AT L., pt. 2, p. 1226, top).

Instances could be cited in the other sections of the Act of February 25, 1927, bearing out the general intention which we contend must be taken into account in considering the precise language of section 1 here under discussion.

E.g. The many provisions of section 7 (44 STAT. AT L., pt. 2, p. 1228) which are referable to the provisions of the law of the State where the national bank in any particular instance does business.

3. ***The Statutes under which National Banks are Authorized to Act as Fiduciaries by State Court Appointment do Not Purport to Relieve National Banks from Court Supervision to which State Banks acting as Fiduciaries are Subjected. Section 1 of the Act of February 25, 1927, should be Construed so as to be Consistent with the Earlier Legislation.***

National banks were originally authorized to act as fiduciaries, in States in which state banks were by law permitted so to act, by the provisions of the Federal Reserve Act of 1913; Act of December 23, 1913, c. 6, §11 (*k*), 38 STAT. AT L., pt. 1, p. 262, which reads:

> "The Federal Reserve Board shall be authorized and empowered:
>
> . . . . . .

(*k*) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The constitutionality of this section was upheld by this Honorable Court in—

First National Bank of Bay City v. *Fellows, Attorney General of Michigan, ex rel. Union Trust Company*, 244 U.S. 416.

The effect of the section upon non-discriminatory provisions of state law regulating the administration of estates was discussed by Mr. Chief Justice *White* in the following language, at pp. 426-427:

"Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law, that is, where the right to perform them is expressly given by the state law or what is equivalent is deducible from the state law because that law has given the functions to state banks or corporations

whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that Board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coördinating the functions when permitted to be discharged by national banks with the reasonable and non-discriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result."

Section 11 (*k*) of the Federal Reserve Act was considerably expanded by the amendment contained in section 2 of the Act of September 26, 1918 (40 STAT. AT L., pt. 1, pp. 968-969. U.S. Code, tit. 12, c. 3, §248 (*k*). This act is so long that it is printed in Appendix A, *infra*, pp. 71 to 73). The amended section was held valid in—

Burnes National Bank v. *Duncan*, 265 U.S. 17—

and was construed as requiring a Probate Court, in a State which permitted state banking corporations to act as fiduciaries, to appoint national banks to similar positions of trust upon proper petition upon the same terms and in like situations without discrimination against national banks. The case did not discuss the question of the validity of non-discriminatory state regulation through the Courts of the performance of fiduciary duties by national banks and state trust companies. The purpose of Congress in this respect is abundantly clear from the committee reports and from the debates on the floor of the House of Representa-

tives. The report of the House Committee on Banking and Currency under date of April 9, 1918 (65th Congress, 2d Sess., House Rep. No. 479), on the proposed act (H.R. 11,283) describes the amendment in the following terms at pp. 2-3:

> "The terms of section 11 (k) are extended, therefore, to permit such powers to be granted to national banks in those States in which the State law discriminates against national banks in this respect.
>
> "Under this amendment, furthermore, it is prescribed that all assets held in any fiduciary capacity shall be segregated from the general assets of the bank; that a separate set of books and records shall be kept; that such books and records shall be open to the inspection of State authorities; that national banks shall not receive in their trust departments deposits of current funds subject to check or the deposit of checks, drafts, or similar instruments; that trust funds deposited with the general assets of the bank shall be properly secured; that the owners of such funds shall have a lien on the securities set apart to protect these funds; that national banks acting as fiduciaries shall comply with State requirements as to the deposit of securities with the State authorities; that national banks shall not be required to execute bonds if State corporations under similar circumstances are exempt from such requirement; that national banks shall have the power to execute such bonds; that oaths or affidavits required may be executed by a national bank officer; and that it shall be unlawful for a national bank to lend trust funds to any bank officer, director, or employee. The Federal Reserve Board, moreover, in passing upon applications is required to take into consideration the amount of capital and surplus of the applying bank and other material facts, and is prohibited from granting such permits to national banks

of smaller capitalization and surplus than is required of State banking institutions under State law. These provisions are intended to impose safeguards upon the exercise of these fiduciary powers by national banks, and to have national banks in the exercise of these powers conform as fully as is practicable with State requirements."

The language of the report makes it abundantly clear that the grant to national banks of power to act as a fiduciary was intended to subject national banks to the requirements of state law regulating the conduct of trusts on an even basis with state bank competitors. Only such provisions of state law as discriminate against national bank fiduciaries in favor of state bank fiduciaries come in conflict with section 11 (*k*), as amended. That this is true is apparent from the language of Mr. *Phelan*, explaining the report in behalf of the committee on the floor of the House (April 24, 1918; *Congressional Record*, vol. 56, pt. 6, pp. 5576-5578). At page 5577, in answering a question, Mr. *Phelan* (a representative from Massachusetts) described the control in the probate court of estates being administered by national banks in the following terms:

"I will call the gentleman's attention to this fact, that the probate court judge or other judge having jurisdiction is supreme master of the situation. If the national bank endeavors to do anything which he thinks is in violation of the trust, he has absolute power to remove that national bank as trustee and appoint any other trustee in his place. All that we are doing by the law is to say that the Federal Reserve Board may enable these banks to act as trustees; but we do not, and, in my own opinion, I think probably we can not say that the national bank could be made a trustee or continued as a trustee if the probate judge

having charge of the estate, or other judge, as the case may be, thought that the national bank was not properly executing its trust, so that the probate or other court is absolute master, in the final analysis."

It is submitted that section 1 of the Act of February 25, 1927, granting fiduciary powers to consolidated national banks as successor to state trust companies having such powers, must be construed as a grant of power of similar import and extent to that given to national banks holding Federal Reserve powers under section 11 (*k*) of the Act of September 26, 1918. Construction of section 1 of the Act of February 25, 1927, in the light of the general grant of power authorized by section 11 (*k*) of the 1918 act is warranted by the familiar doctrine that legislation is to be construed in the light of the general legislative declaration of public policy as established and settled by pre-existing statutes on the same subject.

United States v. *Sweet*, 245 U.S. 563, 567.

The propriety of reference to Congressional committee reports and to explanatory statements in the nature of a supplemental report by the committee member in charge of a bill in course of passage is well settled.

Duplex Company v. *Deering*, 254 U.S. 443, 474-475.

Wisconsin R.R. Commission v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 589.

Cf. Everard's Breweries v. *Day*, 265 U.S. 545, 561.

It is, therefore, our contention that the grant of power (through section 1 of the Act of February 25, 1927) to national banks to succeed state banks (component members of a consolidation with the national bank in question) as fiduciaries is merely a grant of power subject to the non-

discriminatory provisions of state law regulating the conduct of estates by fiduciaries. It becomes necessary to discover, therefore, whether the provisions of Massachusetts probate law pertinent to this case are of general application to national banks and trust companies alike, or whether they are in any sense discriminatory in favor of state institutions to the detriment of national banks. We submit that the rules of probate procedure in Massachusetts governing the present situation are general in their scope, and that they apply to all persons (corporations or individuals) who wish to act in a fiduciary capacity as successor to another person who has ceased to carry out a trust although originally appointed fiduciary in the particular estate by the Court.

4. *The Pertinent Provisions of Massachusetts Law Governing the Conduct by Fiduciaries of Estates under Direction of a Massachusetts Court in No Sense Discriminate against National Banks in Favor of any Other Person.*

The General Laws of Massachusetts of 1921 (hereinafter cited G.L.), c. 192, §4, reads as follows:

> "If a will has been duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor named therein, *if he is legally competent and a suitable person* and accepts the trust and within thirty days gives bond to discharge the same; otherwise said court may grant letters of administration on the estate as provided in the following chapter."

(Italics ours. G.L., c. 193, §7, as amended by St. 1921, c. 64, is quoted in Appendix B, *infra*, p. 74. This section governs original appointments of administrators with the will annexed.)

Under section 4 it has been held that the Probate Court, within a sound judicial discretion, "has the power to refuse to appoint an executor named by the testator if he is incapable of performing the trust, or is unsuitable. It can remove such a person, although duly appointed; and it can refuse, upon adequate evidence, to appoint him if satisfied he is for any reason unsuitable."

Osborne v. *Craig*, 251 Mass. 169, esp. at pp. 172-173.
Cogswell v. *Hall*, 183 Mass. 575, 576-577.

The Massachusetts law is stated in similar fashion by Mr. Chief Justice *Rugg* in the opinion below in the case at bar, 1928 Mass. Adv. Sh. 1213, 1221 (R. 23), where the following language appears:

> "The suggestion in the brief of the petitioner that, 'strictly speaking, a court cannot appoint an executor,' is without merit in this connection. Probate courts are required to find that a person named as executor 'is legally competent and a suitable person' before issuing letters testamentary. G. L. c. 192, §4. The form of letter testamentary in common use by probate courts and doubtless approved by this court under G.L. c. 215, §30, begins with the assertion, after naming the person, 'You are appointed executor.' He has no legal authority as executor until so appointed. Manifestly the executor is appointed by the court as the result of a judicial decision."

(The cases of *Parker* v. *Sears*, 117 Mass. 513, and *National Bank* v. *Eldridge*, 115 Mass. 424, cited in the appellant's brief, p. 37, must be taken to have been superseded and discredited by the later cases, so far as they indicate in any degree that the probate court does not in fact *appoint* executors upon *nomination* of the testator.)

That the decision of the highest court of a State as to the construction of a *statute passed by the legislature of the same State* will be accepted by this Honorable Court is well settled.

Chicago, Milwaukee, St. P. & P. R.R. Co. v. *Risty*, 276 U.S. 567, 570.
Saltonstall v. *Saltonstall*, 276 U.S. 260, 270.

It must be taken as settled in this case that the Massachusetts law requires the Probate Court to make a judicial determination of the fitness of any executor appointed by it to administer an estate as an officer of the Court. A similar determination of suitability is required by statute and by judicial decisions (resting in part, at least, on common-law principles) in the case of the appointment of a successor to an executor who has ceased to carry out his trust.

G.L., c. 192, §8, provides:

> "The executor of the will of an executor shall not, as such, administer on the estate of the first testator."

G.L., c. 193, §9, provides:

> "If a sole or surviving executor or administrator dies, resigns or is removed before having fully administered an estate, and there is personal property of the deceased not administered to the amount of twenty dollars, or debts to that amount remaining due from the estate, or anything remaining to be performed in execution of the will, or if there is an order of distribution in accordance with section twenty-eight of chapter two hundred and six, the probate court shall grant letters of administration, with the will annexed, or otherwise as the case may require, to one or more suitable persons to administer the goods and estate of the deceased not already administered. If it appears that

there are no known heirs of the deceased, a public administrator of the county shall be appointed to the trust."

In *Davis, petitioner*, 237 Mass. 47, 49-50, Mr. Chief Justice *Rugg*, speaking for the Court, construes these sections and defines the words "suitable persons," as found in G.L., c. 193, §9 (dealing with the appointment of administrators *de bonis non* with the will annexed), in the following language, which is equally pertinent with respect to the word "suitable," in G.L., c. 192, §4 (dealing with the original appointment of executors, quoted *supra*, p. 26).

> "It is provided by G.L. c. 193, §9, that under circumstances like those here disclosed the Probate Court shall grant letters of administration with the will annexed to administer the remaining estate 'to one or more suitable persons.' The words 'suitable persons' have no statutory or other fixed and inflexible meaning in this connection. Their context in connection with the history of the statute shows that they were intended to confer a wide discretion upon the Probate Court. They authorize the appointment of the person or persons who appear in the exercise of sound and discerning judgment in the light of all the circumstances of the particular case to be best equipped by temperament, experience and sagacity to discharge the trust with fidelity, prudence and promptness. The appointee should be a fitting person having regard to the special conditions of each estate and those interested in it as creditors, legatees, and next of kin. Suitableness is capacity founded on the innate and acquired qualities of the particular person in his relation to the situation of the estate to be administered, and to those directly and indirectly to be affected by the settlement of the estate. Attention may be given to per-

sonal characteristics and to all the other causes, not easily susceptible of enumeration, rationally affecting a judicious selection."

See *Boynton* v. *Foss*, 238 Mass. 574, 576.
Cf. Martin v. *Otis*, 233 Mass. 491, 496.

(The case of *Frein* v. *Agricultural National Bank of Pittsfield*, 1927 Mass. Adv. Sh. 1809, does not represent the present state of the Massachusetts law. The opinion in that case was recalled after rehearing and the decision of the Probate Court was affirmed without an opinion by an evenly divided court, one judge being disqualified. See supplemental insert to 261 Massachusetts Reports).

See NEWHALL, SETTLEMENT OF ESTATES IN MASSACHUSETTS, 2 ed., §§ 14, 15, 29, 30, esp. pp. 40, 43.

Trust companies may be appointed to positions of trust as officers of the court by the Massachusetts courts having jurisdiction (the Probate Court for the proper county in the case of a trust connected with the administration of the estate of a deceased person) by virtue of the provisions of G.L., c. 172, §52 (since this case arose, amended by St. 1928, c. 128, §2, which, though not pertinent here, permits national banks and trust companies having a principal place of business outside Massachusetts to qualify before the State Board of Bank Incorporation to act as fiduciaries in Massachusetts). The section, in which the words "such corporation" refer to a trust company incorporated under G.L., c. 172, prior to the 1928 amendment, reads:—

"Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator

or trustee under a will or instrument creating a trust for the care and management of property, *under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual.* Any such appointment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or of section fifty without its assent." (Italics ours.)

These and other pertinent provisions (G.L., c. 172, §§ 49-59, and all amendments thereto are printed in Appendix C, *infra*, pp. 75 to 78) were considered by the Supreme Judicial Court at length in—

Commonwealth-Atlantic National Bank, petitioner, 249 Mass. 440, 445, 447, *et seq.* (Certiorari denied, 266 U.S. 617, by memorandum without opinion.)

It is clear from the opinion in that case that the Massachusetts court regards a state trust company as standing upon the same basis as an individual with respect to supervision by the Court, when serving as a fiduciary by appointment of a Massachusetts court. The following cases are to the same effect:

See *Atlantic National Bank, petitioner*, 261 Mass. 217, 220.

Old Colony Trust Co. v. *Wallace*, 212 Mass. 335, 336-337.

Cf. Guaranty Trust Co., petitioner, 248 Mass. 319, 321.

In the following two recent Massachusetts cases a specific application to trust companies by the Probate Court

of the rules pertinent to individual trustees in the conduct of their trusts was approved.

State Street Trust Co. v. *Walker*, 259 Mass. 578.
Boston Safe Deposit & Trust Co. v. *Wall*, 254 Mass. 464, 468-469.

In the very recent case of *Boston Safe Deposit & Trust Co.* v. *Taylor*, 262 Mass. 287; 159 N.E. 619, the question of the "suitability" of a trust company for appointment as trustee was carefully considered. In that case, the Supreme Judicial Court upheld the action of the Probate Court in appointing the trust company.

Consolidation of Massachusetts trust companies now takes place under general act.

G.L., c. 172, §44, as amended by St. 1922, c. 292, reads:

> "No trust company shall be merged in or consolidated with another trust company except with the written approval of the commissioner and under the provisions of sections forty-two and forty-six of chapter one hundred and fifty-six, which are hereby made applicable to the sale or exchange of all the property and assets, including the good will and corporate franchise, of a trust company. The charter of a trust company the business of which shall, on or after July first, nineteen hundred and twenty-two, be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities."

G.L., c. 156, §§ 42 and 46, referred to in the above section, merely cover requirements of stockholder authorization of changes in the capital structure of companies and the method of valuing the shares of non-participating minority stockholders (see *infra*, pp. 79-80, Appendix D).

By G.L., c. 172, §44, as amended, *supra*, it is expressly provided that the charters of trust companies

merged in, absorbed by, or consolidated with "another bank or trust company" shall be void except for the purpose of discharging existing obligations and liabilities. This section has been construed by the Supreme Judicial Court of Massachusetts only in the case at bar. (1928 Mass. Adv. Sh. 1213, 1217-1218; R. 15, 17-18, 20). At pp. 1217-1218 (R. 20) the Court says:

> "The words of said §3 (44 U.S. Sts. at Large, Part II, 1225, 1226) are explicit to the point that the consolidation shall be 'under the charter of such national banking association.' This of itself is clear indication of intent that the State trust company shall not continue as a corporation in combination with the national bank. The words of St. 1922, c. 292, amending G.L. c. 172, §44, are equally explicit that upon any consolidation of a Massachusetts trust company, whether with a bank or another trust company, its charter 'shall be void except for the purpose of discharging existing obligations and liabilities.' The statutes of this Commonwealth upon the subject of a trust company, owing its creation and existence exclusively to those statutes, must be valid and binding to this extent. The later provision of said §3 that there shall be transferred to the national banking association and be held by it among other things the 'franchise' of the State bank, cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It cannot be implied in the absence of explicit statutory enactment to that end. There is no such provision in the statutes of this Commonwealth. Any other conclusion would be in contravention of the laws of this Commonwealth. It is manifest from the terms of said §3 (44 U. S. Sts. at Large, Part II, 1225, 1226) and from the terms of said St. 1922,

c. 292, that the charter of the trust company here in question became void on the consolidation (except for purposes not here material), and that the only corporation now operative is the national bank. *The trust company as a Massachusetts corporation has ceased to be an institution capable of transacting business.*" (Italics ours.)

It is submitted that the same result would be reached if a Massachusetts trust company were consolidated with another Massachusetts trust company under the charter of the second company. The first company would cease to be capable of conducting business. It would no longer be a competent executor, and under the provisions of G.L., c. 193, §9 (*supra*, p. 28), it would become necessary to appoint some other suitable person to the trust as administrator *de bonis non*. In most cases, no doubt, it would be the merged bank which would be appointed, but under the doctrine announced in *Davis, petitioner*, 237 Mass. 47, 49-50 (*supra*, p. 29), it would be for the Probate Court to determine on suitable petition, in the form appearing in Appendix E (*infra*, p. 81), whether the petitioner was a suitable person. No appointment would be made except by the consent of all persons interested, or after notice by citation in the form appearing in Appendix E (*infra*, p. 81). A form of decree of appointment is also reprinted in that appendix. (The forms printed in Appendix E are those prescribed by Probate Court rule, approved by the Supreme Judicial Court. See G.L., c. 215, §30.)

It is well settled in Massachusetts that positions of trust by appointment of Probate Courts give no personal or pecuniary interest to the fiduciary. The relationship of the fiduciary, both to the court and to the beneficiaries, is strictly one of personal confidence and trust.

See Opinion below, 1928 Adv. Sh. 1213, 1222; R. 24, and cases there cited.

Commonwealth-Atlantic National Bank, petitioner, 249 Mass. 440, 445.

Atlantic National Bank, petitioner, 261 Mass. 217, 220.

In the last-mentioned case the following facts appeared: A trust company, duly appointed by the Probate Court trustee under a will, was converted into a national bank. The national bank then was consolidated with the petitioner in that case, another national bank, under the charter of the petitioner. It was held that the petitioner there was not entitled to account as trustee under the ~~new~~ appointment, as it was a different corporation than the trust company originally appointed trustee. Admittedly, this is not precisely the case which would arise if one Massachusetts trust company consolidated with another under G.L., c. 172, §44 (as amended by St. 1922, c. 292, *supra*, p. 32); but we contend that the reasoning in the opinion below (1928 Mass. Adv. Sh. 1213, 1222; R. 15, 24) and in *Atlantic National Bank, petitioner*, taken together with the Massachusetts statutory and decisional law as to successor fiduciaries, makes the following propositions a fair statement of the Massachusetts law:

(*a*) A Massachusetts trust company does not succeed to the fiduciary appointments from Massachusetts courts held by another Massachusetts trust company which has been consolidated with and merged in it (by G.L., c. 172, §44, as amended by St. 1922, c. 292) without new appointment by the Court to such trusts as successor after suitable petition. (The statement contained in the first paragraph of page 11 of the appellant's brief does not state accurately the law in Massachusetts.)

(*b*) A national bank succeeding another national bank by consolidation under section 2 of the Act of November 7, 1918, c. 209, 40 STAT. AT L. 1044, might conceivably succeed to the fiduciary appointments of the other bank, because

said section 2 apparently provides for the continuation of the corporate identity of both national banks in the merged bank. The precise question has not been decided.

See *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195.

[Not the opinion below, but another case holding that the Worcester County National Bank of Worcester might account as the administrator of an estate in which the Merchants National Bank of Worcester had originally been appointed administrator. As will be seen from the record in the case at bar (R. 12-13, 15) and from the statement of facts in this brief (*supra*, p. 3), the Fitchburg Bank and Trust Company and the Merchants National Bank of Worcester were consolidated under the charter of the latter bank, but under the name of the Worcester County National Bank of Worcester. The Supreme Judicial Court held, in the opinion just mentioned (1928 Mass. Adv. Sh. 1195—not the opinion below), that the mere change of name of the national bank originally appointed did not make the consolidated national bank a new corporate entity. After the consolidation and change of name the national bank was held to be still the same national bank under the same charter and, therefore, the same corporation originally appointed administrator by the Probate Court.]

(*c*) A national bank does not succeed to the fiduciary positions held under court appointment by a state trust company which has been consolidated with the national bank under the charter of the latter. (This is the result in the present case as found by the Massachusetts court.)

(*d*) Conversely, on the reasoning of the Massachusetts court, a state trust company which has in any way absorbed the assets of a national bank would not succeed to the fiduciary positions held by such national bank under court appointment.

(*e*) Upon the authority and reasoning of *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195 (see *supra*, p. 36), either a national bank or a state trust company would retain trust appointments granted by the Court to it despite the fact that a consolidation with another bank or trust company had taken place *under the charter of the corporation originally appointed* to the trust after the date of the appointment. This holding would be based upon the continuity of the corporate existence of the corporation originally appointed. Of course, if the consolidated bank became unfit to perform its trust by reason of an interest adverse to the beneficiaries arising out of the consolidation, or for any other ground of incompetency, it could be removed as fiduciary by the Court for cause. See G.L., c. 195, §11, which reads:

> "If an executor or administrator becomes insane or otherwise incapable of performing the trust, or is unsuitable therefor, or if an executor or administrator who resides out of the commonwealth, having been duly cited by the probate court, neglects to render his accounts and to settle the estate, the probate court may remove him; and thereupon the other executor or administrator, if any, may proceed in performing the trust as if the one removed were dead or, if there is no other executor or administrator, the court may appoint an administrator as provided in section nine of chapter one hundred and ninety-three."

See *Brackett* v. *Williams*, 116 Mass. 549 (removal of administrator).

Glines v. *Weeks*, 137 Mass. 547 (removal of administrator).

Cf. Wilson v. *Wilson*, 145 Mass. 490 (removal of trustee).

Attorney General v. *Armstrong*, 231 Mass. 196, 214 (removal of trustee).

A careful examination of the Massachusetts statutes and decisions reveals nothing in any degree casting doubt upon the accuracy of the five propositions (*a*) to (*e*), *supra*, pp. 35 to 37, as a statement of the existing Massachusetts probate law with respect to the continuance of trust companies and national banks as court-appointed fiduciaries after consolidations of the types above mentioned. These propositions, taken in connection with the doctrine that a petition for administration *de bonis non* with the will annexed (or other appropriate petition in the case of other probate trusts) must be presented when an executor becomes incompetent or ceases to exist, show absolutely no discrimination against national banks in the conduct of their fiduciary business in Massachusetts. It must be conceded that the Massachusetts statutes and rules with respect to probate procedure treat national banks as well as state trust companies in every particular. To compel the Probate Court in the case at bar to recognize as its fiduciary the appellant, The Worcester County National Bank of Worcester, under the original appointment of the Fitchburg Bank and Trust Company—

(*a*) Would be in contravention of the rules of Massachusetts probate procedure, and, therefore, inconsistent with the whole tenor of Federal legislation giving national banks power to compete in fields allied to the primary functions of banking *on a parity* with state banks and trust companies, and subject to the same regulatory provisions of state rules of equity and probate law;

(*b*) Would be giving to national banks consolidating with state banks powers of succession as executor, trustee, or other fiduciary, which would not be given to another state trust company absorbing the same trust company under G.L., c. 172, §44, as amended by St. 1922, c. 292 (*supra*, p. 32); a discrimination in favor of national banks which has not elsewhere been given to national banks by Federal legislation with respect to the incidental powers

to compete. We submit that the burden is on the appellant to show a discrimination against it in order to obtain relief from this Court.

The consequence of dealing with assets of estates in process of administration and, therefore, *in custodia legis*, is laid down by the Supreme Judicial Court with respect to a consolidated bank which has not petitioned for appointment as successor to a fiduciary position held by a bank or trust company which it has absorbed. It has been decided that thus intermeddling with the funds of the estate by the consolidated banks renders it liable as an executor *de son tort*.

> *Atlantic National Bank, petitioner*, 261 Mass. 217, 221.

An unauthorized individual dealing with the estate of a deceased person in the same way would be subjected to the same liability.

G.L., c. 195, §§ 14 and 15, which read as follows:

> "Section 14. Whoever injuriously intermeddles with any personal property of a deceased person, without being thereto authorized by law, shall be liable as an executor in his own wrong to the persons aggrieved.
>
> "Section 15. An executor in his own wrong shall be liable to the rightful executor or administrator for the full value of the personal property of the deceased taken by him and for all damages caused to the estate by his acts; and he shall not be allowed to retain or deduct any part of such estate, except for funeral expenses or debts of the deceased or other charges actually paid by him and which the rightful executor or administrator might have been compelled to pay."

See *Clabburn* v. *Phillips*, 245 Mass. 47, 49, *et seq.*

The effect of sustaining the decision below in this case would be to require the appellant to account solely as ex-

ecutor *de son tort* in the estate of Julia A. Legnard from and after the date of the consolidation. That effect could have been avoided by the appellant by the simple expedient of bringing a petition for administration *de bonis non* with the will annexed (see form, Appendix E, *infra*, p. 81). There is nothing upon this record to indicate that the appellant would not have been appointed such administrator upon a suitable petition. Without showing that it has presented such a petition and that the petition has been denied solely or partly because it is a national bank, the appellant does not establish any discrimination against it. The opportunity given to beneficiaries and to other persons interested in the estate to show upon the hearing of such a petition that the petitioner is not a suitable person, by reason of adverse interest or otherwise, is one of the incidents of Probate Court supervision of the administration of estates in Massachusetts to which, we submit, the acts of Congress giving national banks power to act as fiduciaries have subjected those banks in the conduct of their business as fiduciaries.

Two further matters must be mentioned with reference to the law of probate procedure in Massachusetts because of contentions made in the appellant's brief:

(*a*) The case of *Iowa Light &c. Co.* v. *First National Bank of Boston*, 250 Mass. 353 (see appellant's brief, p. 27), is cited by the appellant as a decision by the Massachusetts court that a national bank succeeds as of right by consolidation to all the rights, title, and powers of trust companies which it has absorbed. In that case the precise question before the court was whether the defendant national bank had succeeded an absorbed trust company as trustee under a trust mortgage. The court held that it had. The case is explained and distinguished from cases involving *fiduciaries appointed by a court* in *Atlantic National Bank, petitioner*, 261 Mass. 217, 220-221, in the following language:

"The petitioner relies upon a sentence in the opinion in *Iowa Light, Heat & Power Co.* v. *First National Bank of Boston*, 250 Mass. 353, 354, where, referring to the effect of a similar subsequent conversion of a trust company into a national bank and consolidation with another national bank upon a corporate indenture to secure an issue of bonds given to the trust company, it was held that the national bank had succeeded to all the rights, title and powers of the trust company and was trustee for the bondholders. The point here raised was not there argued and no reference was made to it. That decision was right and is not at variance with the conclusion reached in *Commonwealth-Atlantic National Bank of Boston, petitioner, supra*, here affirmed. The indenture under review in 250 Mass. 353, was a contract between competent parties. The rights and obligations arising therefrom were chiefly contractual in nature although partaking also of such subsidiary fiduciary nature as may spring from such a contract. Fiduciary relations resting on statutory provisions and founded on a decree of a court with the characteristics pointed out in 249 Mass. 440, stand on a different footing with respect to succession by a different corporation for the reasons stated in this latter decision."

See also Opinion below, 1928 Mass. Adv. Sh. 1213, 1220; R. 21-24.

Atlantic National Bank v. *Harris*, 118 Mass. 147 (see appellant's brief, p. 32), may be distinguished on the same basis as the *Iowa Light Co.* case, *supra*.

The distinction between the transfer of contract obligations and the transfer of fiduciary obligations based on court appointment (which are by state law highly personal and confidential and which the State does not permit its own state trust companies to assign or to transfer to successors) is clearly established by the Massachusetts statutes and de-

cisions. It is upon this basis that the Supreme Judicial Court of Massachusetts in the opinion below (1928 Mass. Adv. Sh. 1213, 1220; R. 15, 22) distinguishes *Metropolitan Bank* v. *Claggett*, 141 U.S. 520, and *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293. Obviously, readily assignable obligations and rights based on contract alone were considered in those cases, and, as the Massachusetts court indicates, language in those decisions seeming to have a broader application should be limited to the issues there expressly raised and decided.

(*b*) The other matter mentioned in the appellant's brief which here requires comment is the discussion of St. 1911, c. 128 (appellant's brief, pp. 31, 37). That statute (reprinted, Appendix F, *infra*, p. 84) provided for the consolidation by special act of four Massachusetts trust companies under the name of one of them, The Old Colony Trust Company. It was expressly provided that the merger thus authorized should not "work a dissolution of any of said trust companies or a termination of their several corporate existences." A further provision was made for the continuance of the obligations, duties, trusts, and liabilities of the merged banks by the consolidated bank under the name of Old Colony Trust Company. The pertinent section (§3) of the statute has never been construed by the Supreme Judicial Court of Massachusetts, so far as we have been able to discover. The statute, we contend, is not in any sense helpful to the appellant in the case at bar; even if the statute (St. 1911, c. 128, §3, *infra*, p. 84) be construed as entitling the Old Colony Trust Company to exercise the functions of fiduciary in cases where the other corporate parties to the merger had originally been appointed by the Court:

(*i*) The statute was a specific determination by the Massachusetts legislature that a specific combined trust company was empowered to act as executor, trustee, etc., subject to the supervision of the Probate Court, where its

component parts (other trust companies whose corporate existence was expressly continued in the merged trust company) had been appointed. It was not a *general* determination that *all* merged trust companies were so empowered to act. It was at the most a finding of fact by the legislature that a *specific* trust company would embody the corporate existence of all its component parts, and would constitute a "suitable person" where any of its component parts had been so regarded by the Court. We do not doubt that the Probate Court would have removed the Old Colony Trust Company as fiduciary in any case where the consolidation caused the combined bank to be representing other interests inconsistent with the trusts in that specific case (compare, *supra*, p. 37). The consolidation in the case at bar took place under a *general* statute.

(*ii*) Under the propositions of law with respect to continuance of consolidated banks as trustees which we have already stated (*supra*, pp. 35 to 37), the Massachusetts court could consistently have permitted the Old Colony Trust Company to account in an estate where the Massachusetts Trust Company (one of the parties to the merger) had originally been appointed by the Court as executor, because of the express act of legislature continuing the corporate existence of the Massachusetts Trust Company in the Old Colony Trust Company. The original executor, the original officer of the court, still existed, though under a different name, and under the doctrine of *Worcester County National Bank, petitioner* (No. 1), 1928 Mass. Adv. Sh. 1195; 161 N.E. 797, the change in name did not result in a change in corporate identity. The situation in the case at bar is clearly distinguishable. By the construction of G.L., c. 172, §44 (as amended by St. 1922, c. 292, *supra*, p. 32), adopted by the Massachusetts court (in the opinion below, 1928 Mass. Adv. Sh. 1213, 1218; R. 15, 20), upon any merger or consolidation, a state trust company which is merged in or is the subordinate party to a consolidation

with another trust company or bank ceases to have any corporate identity and is thereafter incapable of doing business. After the consolidation, therefore, the executor appointed by the Probate Court did not exist.

(iii) At the time of the passage of St. 1911, c. 128, there was no general statute authorizing the consolidation of state trust companies. Special act of legislature alone could achieve the result, and we do not dispute that it was as competent for the legislature to declare that two of its own corporate creatures should combine and carry on thereafter a joint corporate existence as for it to provide for an increase in the amount of authorized capital stock of one of the corporations. A general statute has since been passed covering consolidations of state trust companies with other banks (originally passed as St. 1914, c. 504, §2) and by the terms of that general statute (as it now stands in G.L., c. 172, §44, as amended by St. 1922, c. 292) the consolidation effects a termination of the corporate existence of the absorbed trust companies. The present general situation, rather than the sporadic instance long in the past of special legislation, must be taken as representing what the Massachusetts legislature permits to its own corporations doing a fiduciary business by way of continued corporate existence for the purpose of such fiduciary business after a consolidation.

Cases in some jurisdictions other than Massachusetts do not represent the law in Massachusetts as to the right of a consolidated corporation to succeed without new appointment by the Court to the court appointments of its component parts. Such cases hold that under the law of those States a consolidated corporation is sufficiently the successor of the component corporations, parties to the consolidation, to be recognized as successor to all interests in the fiduciary duties and privileges of those component corporations.

New York:

Bergdorf's Will, 206 N.Y. 309.
O'Rourke v. *Standard Wood Turning Co.*, 204 App. Div. 658.
Cf. Re Doane's Estate, 208 N.Y. S. 320.
Wright v. *Wright*, 225 N.Y. 329, 338.

Illinois:

Chicago Title & Trust Co. v. *Zinser*, 264 Ill. 31:

(In this case a successor trust company, by consolidation, was treated as the executor named in the will, although the absorbed trust company had ceased to exist according to state law. The case takes a different view of the law than the Massachusetts decision in *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440; certiorari denied 266 U.S. 617.)

Pennsylvania:

Turner's Estate, 277 Pa. 110—

is not by any means a square holding for the proposition for which the appellant cites it in its brief at p. 31, viz., that a consolidated bank is entitled to succeed, without new petition to the court, to the trust appointments of banks which it absorbed. In that case it appears at page 113 that the consolidated national bank presented to the Orphan's Court a petition requesting that funds of an estate, administered by a state trust company which it had absorbed, be paid to it and that it be approved as fiduciary. We submit that the decision merely goes to a holding that the Orphan's Court could not refuse to appoint the consolidated bank as fiduciary purely because it was a national bank. Nothing in the decision can be construed as a holding that the consolidated bank would be entitled to account as fiduciary without new appointment by the Orphan's Court. That point was not raised, was not discussed, and

was not decided. The point decided—that national banks cannot be refused appointments by state courts, if otherwise suitable persons, purely because they are national banks—is law in Massachusetts (see opinion below, 1928 Mass. Adv. Sh. 1213, 1226, R. 15, 27-28; *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 442; *Atlantic National Bank, petitioner*, 261 Mass. 217, 220), as indeed it must be following *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416; *Burnes National Bank* v. *Duncan*, 265 U.S. 17. See similar cases in other States: *Hamilton* v. *State*, 94 Conn. 648; *People, ex rel. First National Bank of Joliet*, v. *Russell, Auditor*, 283 Ill. 520; *Re Mollineaux*, 179 N.Y. S. 90; *Stanchfield's* Estate, 171 Wis. 553; *Carpenter* v. *Aquidneck National Bank*, 46 R.I. 152. We think the cases last cited are consistent with the Massachusetts law upon the precise point that there must be no discrimination against national banks.

California:

> *Mercantile Trust Company* v. *San Joaquin &c. Corp'n*, 265 Pac. 583 (Calif. Dist. Ct. of App., 3d Dist., Feb. 29, 1928)—

is merely on its facts (see appellant's brief, p. 28) a case like *Iowa Light, Heat & Power Co.* v. *First National Bank*, 250 Mass. 353, 354. That case and *Atlantic National Bank* v. *Harris*, 118 Mass. 147, as already stated (*supra*, p. 40), are distinguishable on the basis of the differentiation existing under Massachusetts law between fiduciary relations growing out of contract and those which depend fundamentally upon court appointment. So far as the California decision deals with the continued corporate existence of trust companies (see appellant's brief, p. 28), it is inconsistent with the Massachusetts law with respect to the invalidation of the charters of trust companies upon their merger in another corporation (see *supra*, pp. 32 to 34).

5. *The Disputed Language, Properly Construed, of the Act of February 25, 1927, §1, Confers upon a Consolidated National Bank the Power to Act as Fiduciary in the Estates in which a State Bank or Trust Company, which it has Absorbed, has thus Acted after Compliance with the Non-Discriminatory Provisions of State Law Applicable to All Successors of Fiduciaries and without a Permit from the Federal Reserve Board to Act as Fiduciary Generally.*

We have endeavored thus far in this brief to show that section 1 of the Act of February 25, 1927, by its own language (*supra*, pp. 19 to 20), as interpreted in the light of its own legislative history (*supra*, pp. 14 to 18) and in the light of preëxisting Federal legislation permitting and authorizing national banks to do business as fiduciaries, gave to national banks power to act as fiduciaries as successors to state trust companies only in compliance with the non-discriminatory provisions of state probate law governing the succession of court-appointed fiduciaries. We contend that we have shown (*supra*, pp. 26 to 40) that the provisions of Massachusetts law applied to the appellant in the case at bar would be applied to any person (whether an individual, a state trust company, or a national bank) intermeddling with the assets of the estate of a deceased person without authority from the court after the executor originally appointed had died or had ceased to exist as a person capable of doing business as a fiduciary. It is necessary for us to show at this point precisely what we believe is the significance of the disputed language (quoted *supra*, p. 16) in section 1 of the Act of February 25, 1927, for that language must be taken to have some effect independently and apart from a restatement of pre-existing statutory enactments. In the language of Mr. Justice *Sutherland*, in *Petition of Public National Bank of New York*, U.S. Supr. Ct., Oct. term, 1928, No. 16, dec. November 19, 1928, 49 Sup. Ct. Rep. 43, 44:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "

We submit that the disputed words in section 1 of the Act of February 25, 1927 ("*including the right of succession as trustee, executor, or in any other fiduciary capacity* in the same manner and to the same extent as was held and enjoyed by such State or District Bank so consolidated with such national banking association"—see *supra*, p. 16), have an independent meaning and a novel force and effect without going to the extent contended for by the appellant, whose construction would be at once in total disregard of the spirit of the whole statutory history of the grant of power to national banks to act as fiduciaries (including the Act of February 25, 1927) and in contravention of the uniform and non-discriminatory requirements of Massachusetts probate practice. The construction which we believe the court should attach to the disputed language is as follows:

(*a*) Consolidated national banks are by section 1 granted the *power* to act as fiduciary in estates in which any bank (whether state bank, trust company, or national bank) party to the consolidation had already qualified as fiduciary or by state law was entitled so to qualify; whether or not the particular consolidated national bank had received a permit to do a fiduciary business from the Federal Reserve Board (under section 11 (*k*) of the Federal Reserve Act, as amended by section 2 of the Act of September 26, 1918, quoted, Appendix A, *infra*, pp. 71 to 73; see also *supra*, pp. 20 to 26). By said section 11 (*k*), as amended,

national banks desiring to do a general business as fiduciaries were required to get a permit from the Federal Reserve Board before undertaking such business. It is our contention that the disputed language (see *supra*, pp. 16, 48) in section 1 of the Act of February 25, 1927, in substance authorizes national banks with which a state bank or trust company has been consolidated to act as fiduciary without the Federal Reserve Board permit required by section 11 (*k*) in estates in which the state trust company had acted in similar capacity—*i.e.* in those particular estates; it would not be *ultra vires* the consolidated national bank or otherwise unlawful for it to act as fiduciary.

This is in part the construction taken by the Federal Reserve Board in construing the section in its regulations.

> Regulation F, Series of 1928; published Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 286 *et seq.*, and quoted in part, Appendix G, *infra*, p. 86; see appellant's brief, p. 44.

(*b*) The right of succession to the absorbed state bank or trust company as fiduciary is given to the consolidated national bank to the extent that the state bank or trust company had a right, vested and assignable under the laws of the State which created the right. Subject to the procedural provisions of state statute law, as are all the other provisions of section 1 of the Act of February 25, 1927 (see discussion, *supra*, pp. 19 to 20), the consolidated bank, by virtue of the disputed language, may perfect its power to act as fiduciary in the particular estates in question by suitable application to the Probate Court (if such application be required by state law) in cases of court-appointed fiduciary positions; or by the execution of appropriate documents in the case of fiduciary rights arising purely *ex contractu* [*e.g. Iowa L., H. & P. Co.* v. *First National Bank*, 250 Mass. 353, 354; *Mercantile Trust Company* v. *San Joa-*

quin &c. Corp'n, 265 Pac. 583 (Calif. Dist. Ct. of App., 3d Dist., Feb. 29, 1928), see *supra*, p. 46]. The fact that in some States, as we have indicated above (*supra*, p. 44), the law of probate procedure is different from the Massachusetts law and permits consolidated corporations to succeed automatically to the court appointments of their component parts as fiduciaries lends weight to our contention. In such States the disputed words of section 1 would have the force for which the appellant contends. Since, in such jurisdictions, state trust companies succeed automatically to the court appointments of other trust companies which they have absorbed, national banks similarly absorbing other corporations will do so. In those States the right to have a corporate successor succeed to the appointment as fiduciary is implied in, and is an integral part of, the original appointment by the Court of a corporation as a fiduciary. It makes the appointment in effect assignable upon merger or consolidation.

See *e.g. Bergdoff's Will*, 206 N.Y. 309.
O'Rourke v. *Standard Wood Turning Co.*, 204 App. Div. 658.
Chicago Title & Trust Company v. *Zinser*, 264 Ill. 31 (see *supra*, pp. 44 to 46).

Under the legislative policy behind section 1 and all other legislation with respect to the so-called "incidental powers" of national banks, they have the power to compete on equal terms with state banks in the exercise of the incidental powers; and section 1, in accordance with that policy, gives the right of automatic succession as fiduciaries generally to consolidated national banks in States where any corporate successors are permitted automatically to succeed corporate predecessors as fiduciaries. In Massachusetts, as we trust we have indicated sufficiently above (*supra*, pp. 34 to 38), automatic succession of a con-

solidated corporation to the court fiduciary appointments of corporations which it has absorbed is not permitted by the probate law of the State. Whatever may be the logical merit of this policy so far as it is based on decision, it is the state law as declared by the highest court of the Commonwealth, and this Honorable Court will accept it as such. (The contentions of the appellant in its brief, pp. 36 to 40, we submit, in so far as they purport to state the Massachusetts law, are inaccurate; and, in so far as they claim it to be logically unsound, are irrelevant.) There is obviously no legislative intention that there shall be geographical uniformity in the application of section 1 of the Act of February 25, 1927. The force of the disputed language will undoubtedly vary as among the several States. For example, a New Hampshire trust company will have no appointments as executor or administrator upon its books (see *Woodbury's Appeal*, 78 N.H. 50, construing New Hampshire Laws of 1915, c. 109, §34) as to which any question of succession may arise because of state statutory limitations upon the right of any corporation to act in those capacities. On the other hand, in some States, like Illinois (under the *Zinser* case, 264 Ill. 31, see *supra*, p. 45), the consolidated national bank would probably succeed automatically to many different types of fiduciary business. The same may be said as to the lack of uniformity of operation of other portions of the section. In some States all consolidations of state banks may be forbidden unless specially authorized by special act of legislature; in others, no consolidation may be "in contravention of state law." It cannot be said, we submit, in view of the difference in effect and operation of the section as among the several States in other respects, that the disputed language must have been intended to give all national banks wherever situated the same powers, privileges, and rights regardless of the variations in state law. We submit, therefore, that the words "the right of succession" imply the right of suc-

cession as such right exists by state law in each State with respect to corporations acting as fiduciary. In Illinois that would probably have the automatic effect which we have indicated above. In Massachusetts automatic succession as fiduciary could extend only to trusts arising *ex contractu* (see *supra*, pp. 40 to 42). As to Massachusetts court appointments as fiduciary, the state law and, we submit, section 1 give to a consolidated corporation at most the right to apply for appointment as successor, with possibly the additional standing (by force of section 1) of being *prima facie* the most appropriate successor. How far the consolidated bank is entitled to succeed upon proper petition, if a "suitable person," is not presented on this record and need not be decided, for the Worcester County National Bank has never petitioned the Probate Court for Worcester County for appointment as administrator *de bonis non cum testamento annexo* of the estate of Julia A. Legnard (see Appendix E, *infra*, p. 81, for appropriate form. See also *supra*, pp. 28 to 30). It is altogether likely that, had such a petition been presented to the Probate Court, it would have been granted. At all events, the record gives no basis for considering the effect of a denial of such a petition.

The construction of the disputed language (*supra*, p. 16) for which we contend, therefore, may be summarized, in the situation in the case at bar, as empowering and entitling the Worcester County National Bank—

(*a*) To do business as a fiduciary in estates previously handled by the Fitchburg Bank and Trust Company without a permit from the Federal Reserve Board.

(*b*) To apply to the Court for appointment as successor fiduciary in the estates previously handled under court appointment by the Fitchburg Bank and Trust Company in accordance with the provisions of Massachusetts statutory and decisional probate law.

(*c*) To succeed automatically to fiduciary positions, previously held by the Fitchburg Bank and Trust Company, arising out of contract rather than from court appointment.

Such a construction, we submit, gives to the disputed language a reasonable force and effect, consistent with the legislative intent manifested by national bank legislation in general and in particular by section 1 of the Act of February 25, 1927. The construction does no violence to fundamental and non-discriminatory provisions of state law, and in many States gives to the language the force for which the appellant contends, preserving at the same time, in States having provisions of law similar to those in force in Massachusetts, the close Probate Court supervision of the administration of estates which a sound policy of protecting the beneficiary (rather than enrichment of the fiduciary) requires. There is no doubt as to the constitutionality of section 1 or of any portion thereof under this interpretation, and, if the construction outlined be accepted by this Honorable Court, the decree below should be affirmed without discussion of the constitutional question upon which the Supreme Judicial Court of Massachusetts based its decision.

II.

IF SECTION 1 OF THE ACT OF FEBRUARY 25, 1927, BE CONSTRUED TO REQUIRE A STATE PROBATE COURT TO RECOGNIZE AS EXECUTOR A CONSOLIDATED NATIONAL BANK IN THE PLACE OF THE COURT'S ORIGINAL APPOINTEE, A TRUST COMPANY WHICH HAS BEEN ABSORBED BY THE CONSOLIDATED BANK, WITHOUT NEW APPOINTMENT BY THE COURT OF THE CONSOLIDATED BANK AS FIDUCIARY, SECTION 1 IS PRO TANTO IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Our argument above (*supra*, pp. 10 to 53) has been that section 1 of the Act of February 25, 1927, should be con-

strued in a manner which would raise no doubt as to its constitutional validity. The construction for which we contend has been set forth fully (*supra*, pp. 47 to 53). If, however, the construction there suggested is not taken by this Honorable Court, a further question arises as to the constitutional validity of a portion of the section. The construction of the disputed words of section 1 taken by the Supreme Judicial Court of Massachusetts (R. 24, and assumed by the appellant in its brief, pp. 11, 21, 33, 42, *et seq.*) is stated by Mr. Chief Justice *Rugg* in the following language in the opinion below, 1928 Mass. Adv. Sh. 1213, 1223; R. 15, 25):

> "The words just quoted from said § 3 seem to us to carry the unmistakable import that in case of consolidation the national banking association shall possess and enjoy all appointments as executor, administrator, or other fiduciary held by the absorbed State bank by virtue of any decree of any court without further action by the appointing court, as fully and completely as if it were the State bank, or as if it had originally been appointed to these fiduciary positions by the court."

The Supreme Judicial Court took this view under circumstances already outlined above (*supra*, p. 11), probably resting its decision in large part upon the construction taken by the Comptroller of the Currency (see Fourteenth Annual Report of the Federal Reserve Board, 1927, pp. 267-271; appellant's brief, p. 42 *et seq.*). Although great weight should be given to a long-existing departmental interpretation of an ambiguous statute, particularly to a construction which is contemporaneous with the passage of the act, a departmental construction cannot be given the force of law when the construction is challenged in the courts almost as soon as it is known.

See *Iselin* v. *United States*, 270 U.S. 245, 251.

We submit that this Honorable Court should not follow the Massachusetts court in its reliance upon the opinion of the Comptroller of the Currency. If, however, the construction of the disputed words of section 1 taken below is followed by this Court, we contend that those words as construed are invalid, as in conflict with the Constitution of the United States, because they constitute an attempt by Congress to regulate matters expressly reserved to the States.

A. *The Control of the Administration of the Estates of Deceased Persons is Reserved to the States.*

There is nothing in article I, section 8, of the Constitution of the United States, containing the express grant of power to the Congress, which in terms or by construction gives to the Congress control over the administration of the estates of deceased persons. The States, by article I, section 10, are not forbidden to exercise such control, and it follows that by article X of the Amendments to the Constitution, this control being a power not delegated to the United States, is reserved to the States. The administration of estates was a function carried on by the local authorities of the several States long prior to the adoption of the Federal Constitution. It is a matter in its nature almost of necessity of local concern. The framers of the Constitution and the members of the conventions which ratified it must be taken to have known of the exercise of control over decedents' estates by the several States. In Massachusetts, the administration of estates was provided for from the earliest days of the Massachusetts Bay Colony. See the following documents in "The Charters and General Laws of Massachusetts Bay" (Boston, 1814 ed.): Colony Charter, 1628, p. 14; Province Charter, 1691, p. 32; Acts respecting Wills and the Distribution of Intestate Estates, p. 203. See short summary of Colonial Probate Practice,

PERLEY, MASSACHUSETTS PROBATE PRACTICE (2 ed. 1907), pp. 1-3. The Great and General Court, shortly after the adoption of the Constitution of the Commonwealth of June 15, 1780, enacted comprehensive provisions for courts of probate. St. 1783, c. 46, approved March 12, 1784. These provisions have remained substantially unchanged to the present time. In construing the reservation of powers contained in article X of the Amendments, the existence of the Massachusetts legislation just referred to is important.

See rule of construction laid down in *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 723; *cf. Myers* v. *United States*, 272 U.S. 52, 175.

This Court has recognized that the right of succession at death and the supervision of the exercise of the right is based on the authority and sovereignty of the several States. *Plummer* v. *Coler*, 178 U.S. 115, 137; *Tilt* v. *Kelsey*, 207 U.S. 43, 57; *cf. Stebbins* v. *Riley*, 268 U.S. 137, 141. It has further recognized that the assets of an estate in process of administration are in the custody of a court exercising probate powers. *Yonley* v. *Lavender*, 21 Wall. 276, 280; *Byers* v. *McAuley*, 149 U.S. 608, 615; *cf. Lion Bonding Co.* v. *Karatz*, 262 U.S. 77, 88-89.

To some extent, in its incidental phases, at least, the transmission of property at death by virtue of state law may be materially affected by action of Congress within the scope of some of its enumerated powers. An instance of the exercise of this power is the taxation of the transmission of estates by way of excise, upheld in numerous cases.

Knowlton v. *Moore*, 178 U.S. 41, 56-61.
New York Trust Company v. *Eisner*, 256 U.S. 345, 348, *et seq.*
Cf. Florida v. *Mellon*, 273 U.S. 12, 16, *et seq.*

With respect to the incidental business of national banks, confessedly Congress may forward the national in-

terest by permitting banks to do such business so far as the express powers contained in article I, section 8, of the Constitution warrant. *Burnes National Bank* v. *Duncan*, 265 U.S. 17; *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416. The extent and scope of the enumerated powers on which the National Banking system and the Federal Reserve system rest must here be considered, as well as the effect of state law and regulation upon the exercise of the incidental powers.

B. *Congress may Provide for the Protection of National Banks from Discriminatory State Legislation with Respect to their Incidental Powers. It can Maintain National Banks in Their Exercise of the Incidental Powers upon a Parity with Competing Corporate Agencies of the States Carrying on Similar Functions. The Power of Congress with Respect to the Incidental Powers of National Banks is Limited to the Protection of the Exercise of Those Powers from Discriminatory State Legislation or Action and to the Preservation of Equal Opportunity to Compete with State Banks. Non-Discriminatory State Laws Regulating the Administration of Estates are beyond Congressional Interference under the Constitution.*

The general power of the Congress with respect to banking and finance is so well established as to require no discussion. With the general statements contained in the appellant's brief (pp. 9 to 15) as to the necessity for a powerful national banking system, on the whole, we do not disagree. Nor is the plenary power of Congress with respect to the primary banking functions in any way disputed here. The general constitutional doctrine has been amply stated by Mr. Chief Justice *White* in *First National Bank of Bay City* v. *Fellows, ex rel. Union Trust Co.*, 244 U.S. 416, 418, *et seq.*, where the authorities, beginning with *Mc-*

Culloch v. *Maryland*, 4 Wheat. 316, were summarized. With the doctrine there stated, the Supreme Judicial Court of Massachusetts, in the opinion below (1928 Mass. Adv. Sh. 1213, 1226; R. 15, 27-28), states its cordial agreement. Where, in the exercise of powers not primarily banking functions (powers within the gift of the Congress only because of a situation of state law making the grant of power as a matter of fact an appropriate adjunct of the primary banking function), national banks come to carry on business as officers of state courts by appointment of those courts, a situation arises which calls for a rather delicate adjustment of the balance of authority between two sovereignties, the Federal Government and the States, each of which has exclusive jurisdiction over some phases of the situation, while at the same time, with respect to other phases, each is unable to exclude the exercise of jurisdiction by the other sovereignty. The interplay of authority of the two sovereignties, at the same time partly conflicting and partly coördinate, gives rise to a justiciable constitutional question which this Honorable Court must decide in the last analysis, giving due weight to the boundaries of Federal and State power, so far as those boundaries are by the Constitution capable of absolute measurement; and respecting the judgment of Congress upon questions of fact and policy (provided that judgment bears any rational relation to the situation of fact in the external world of national and business affairs) in so far as the constitutional powers which Congress purports to exercise depend upon a legal standard, laid down in the Constitution, under which standard the precise form and extent of the exercise of the powers may vary as the facts of the life of the nation change. The constitutionality of the exercise of either State or Federal power with respect to its effect upon the powers of the other member "of our constitutional system of dual sovereign governments" (see Mr. Justice *Stone*, speaking for the Court in *Metcalf &*

Eddy v. *Mitchell*, 269 U.S. 514, 521) depends in the last analysis upon a weighing by this Court of the burden imposed by the exercise of the power asserted upon the exercise of another power admittedly within the province of the other sovereignty. Such is the method of approach of this Court in cases involving taxation by one sovereignty either directly or indirectly of the instrumentalities of the other. The validity of the tax depends upon the degree and directness of the impediment of the exercise of the power affected by the tax. To quote further from the opinion in *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523:

> "Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

A similar attitude of weighing the extent of Congressional interference with the exercise of state powers appears in *Knoulton* v. *Moore*, 178 U.S. 41, 59-60.

We submit, therefore, that this Court will endeavor to reach a conclusion which carries out the Congressional intention that national banks shall be able to consolidate freely with state banks without resulting loss of business and at the same time a result which does not interfere with the proper operation of the non-discriminatory provisions of state law governing the administration of estates. The incidental powers of national banks have been given to them by Congress to protect them from state bank-

ing competition, which has arisen because the States have permitted other businesses to be joined with the banking function. The banking function is clearly within the scope of Congressional power and Congress may protect its integrity from more favored competing state agencies by permitting national banks to do all forms of business which those competing agencies do, even though, in the absence of the competition furnished by those agencies, there would be no constitutional justification for empowering national banks to do such business. More particularly, the power of national banks to act as fiduciaries rests upon the competition with the primary banking functions furnished by state banks which do a fiduciary business as well. In the absence of such competition the constitutional basis for the grant of power would not exist. This, we submit, was recognized in the case of *First National Bank* v. *Fellows, ex rel. Union Trust Co.*, 244 U.S. 416, 425-426. The protection of the power to compete was also made the basis of upholding the constitutionality of section 11 (*k*) of the Federal Reserve Act as amended by the Act of September 26, 1918 (see Appendix A, *infra*, p. 71; see *supra*, pp. 20 to 26), in *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 23-24. It is of the essence of the idea of competition that two or more persons engaged in the same occupation be carrying on that occupation upon even terms, subject to the same limitations and restraints, given the same advantages and opportunities. The right and power to compete, granted to national banks by Congress under the Constitution, extends by its very nature only to freedom from discriminatory restraint and regulation by the State in businesses allied to banking, in which the right of national banks to engage at all rests constitutionally upon the fact that state banks engage in such business.

We do not understand that the appellant seriously disputes the fact that the regulation of the succession of estates is a matter constitutionally under the primary con-

trol of the several States; although in its brief (p. 33 *et seq.*) it is argued that Congress is competent as a legislature to substitute its determination of the fitness as executors of national banks generally for the judicial determination of the Probate Courts of the States in specific instances. We submit that this contention is carrying altogether too far the doctrine that incidental powers may be attached to the banking function. There must be a point where the exercise of Congressional power becomes too remotely connected to any of the enumerated or implied powers in the Constitution, art. I, sec. 8, and bears too heavily upon the admitted right of the States to regulate matters within their reserved powers. *Cf. Child Labor Tax Case*, 259 U.S. 20, 36, *et seq.* In that case, the Chief Justice, speaking for this Honorable Court, said with respect to the purported exercise of the taxing power by Congress there considered (at p. 38):

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

In the case at bar (if the construction of section 1 of the Act of February 25, 1927, taken by the Supreme Judicial Court of Massachusetts, be taken by this Court) it might equally well be said that the contention of the appellant, if sustained and pushed to its logical consequences, would enable Congress to control any one of the subjects of pub-

lic interest, jurisdiction of which the States have never parted with, by permitting national banks to do all the business connected with the subject and by making regulatory provisions for the doing of such business by national banks. The sovereignty of the States is in as much danger from undue extension of Congressional *favors* to national banks with respect to matters not primarily banking functions as it was in 1922 at the time of the *Child Labor Tax Case* from an unwarranted purported use of the taxing power.

We have already said enough (*supra*, pp. 35 to 38) to show that Massachusetts does not in any way by its probate law discriminate against national banks or consolidated national banks in favor of any other person. Under Massachusetts law, where by consolidation a separate corporate person appears in place of the corporate person originally appointed to some trust by the courts of the State, the position of trust becomes vacant. The corporate successor, by consolidation or otherwise, must, if it desires to carry out the trust, seek new appointment, giving the courts of the State an opportunity to pass upon the fitness of the new corporation for the particular trust. The situation is no different with respect to the succession of individuals. The rule laid down by Massachusetts law is for the benefit of the beneficiaries of trusts or estates, and indirectly for the benefit of the public generally.

The Massachusetts legislature, before the adoption of the Federal Constitution (see *supra*, p. 55), saw fit to make the supervision of the conduct of estates and trusts a judicial matter of the utmost importance. The supervision given by the courts of Massachusetts under the powers delegated to them has unquestionably resulted in a high standard of fiduciary conduct within the Commonwealth, the popularity of which is reflected in part in the growth of the so-called "Massachusetts Trust" whereby the common-law trust device has been made available for

business purposes. We think it obvious that this growth would never have taken place except for the experience of residents of the Commonwealth with individual trustees of great integrity, kept to a high standard of business management, honesty, and disinterested service by the supervision of the courts. In the administration of estates of deceased persons the public interest in court supervision is infinitely greater than in the case of business trusts. Without stooping to maudlin sentimentality in the slightest, it is perfectly fair to say that the Probate Court is the safeguard provided by the Great and General Court for the widows, orphans, and other helpless dependents of decedents. The rules of supervision of estates laid down by the Massachusetts law (both statutory and decisional) are for the prevention of fraud, dishonesty, and incompetency in connection with the primary support of a helpless group in the community, the members of which, if not protected to the utmost, may become public charges. The attitude that fiduciary business is primarily for the benefit of the fiduciary (particularly if that fiduciary be a bank or trust company), rather than for the benefit of the *cestuis que trust* or heirs and legatees of an estate, is directly opposed to the fundamental principles of Massachusetts jurisprudence. Such an attitude, we feel, unconsciously colors even the careful discussion of the situation in the case at bar by *Thomas B. Paton*, Esq., *Succession to Trust Powers on National Bank Consolidation*, American Bankers Association Journal, August, 1928, p. 97.

The reserved powers of the Commonwealth (under article X of the Amendments of the Constitution of the United States) could not be more properly exercised than in connection with the administration of estates, and in no respect could unconstitutional Congressional interference with those powers result in a greater denial of state sovereignty. Yet we do not contend for an instant that these powers can be used by Massachusetts "to reach an

unconstitutional result" (to use the language of Mr. Justice *Holmes* in *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 24). Massachusetts admittedly does not attempt to use its power to control the administration of estates to destroy nor indeed injuriously to affect the power of national banks to compete. The regulation of fiduciaries imposed by state law is established for another purpose; it applies evenly to state trust companies and to national banks when in the same situation; it has no discriminatory effect upon any person or corporation; its sole object and effect is the maintenance of a sound system of the administration of estates subject to judicial supervision at all times, and especially where a person appointed to a trust ceases himself to serve, and a new person must succeed to the trust. Such a provision is a proper exercise of a reserved power of the State, we submit, and should be supported even when it comes in conflict with a purported exercise of Congressional power. Such a provision will be improper if it discriminates against a Federal instrumentality; it would be void if it stands directly in the path of the direct exercise of one of the enumerated or implied powers of Congress to the extent of the impediment. So long, however, as it merely applies evenly to a Federal agency indulging in an incidental occupation which for its very existence depends upon state law and state action (as do the incidental powers of national banks) then the state regulation must control if the Tenth Amendment is to mean anything. We submit that the Constitution permits exercise of the reserved powers by the States so long as they do not discriminate against Federal agencies performing duties primarily subject to state supervision.

The question in the case at bar may seem too trivial to require such extended discussion. The question is one of a principle which, once established, will at least logically govern cases directly involving more immediate important results. The court below had declined to recognize as its

officer a corporation other than one which it appointed executor. The corporation demanding to be recognized (the appellant here) bases its contentions upon an Act of Congress purporting to give it the right to be recognized automatically as the successor of the original appointee. Congress here asserts that it possesses the power to substitute its determination for the judicial determination required by Massachusetts legislation. There is a clear assertion by Congress of its power to deal with a matter within the primary and exclusive powers of the States, thereby burdening and impeding materially the administration of justice within the State with respect to a matter actually regulated in non-discriminatory fashion by the Massachusetts legislature. The assertion of this power (to forward and to favor the exercise by a Federal agency of a non-Federal function under terms not granted to individuals or to state agencies by state law) raises a fundamental constitutional issue as to the power of the Federal Government to extend its control over matters left by the Constitution to the States, under the guise of forwarding one of the enumerated or implied powers under article I, section 8, of the Constitution. Such a question is not trivial and the appellant recognizes this fact in its brief at p. 9 *et seq.*), although there contending that Congress may give to national banks not only power to compete with state banks in fields primarily subject to state supervision, but may also give to national banks freedom from state supervision while performing duties as officers of the courts of the States (see appellant's brief, p. 25 *et seq.*). The statement of the proposition, we submit, shows the impropriety of referring to State sovereignty or powers in any sense if the appellant's contention be sustained by this Honorable Court. We submit that this Court has already recognized the truth of our contention that non-discriminatory state regulation of the business within the scope of the incidental powers of national banks controls

the exercise of those powers by national banks. See *Burnes National Bank* v. *Duncan*, 265 U.S. 17, 24, where Mr. Justice *Holmes* refers to the case of *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416, 425, and mentions the incidental business of national banks as being in a general sense subject to the authority of the States to regulate such business. In the *Fellows* case Mr. Chief Justice *White* says at page 426:

> "Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers" (see *supra*, p. 21).

This reasoning, we maintain, is conclusive as to the soundness of our contention.

There is one outstanding logical fallacy in the appellant's brief which must be mentioned here. The statement is made that, inasmuch as probate procedure may be regulated by statute by the legislative bodies of the several States, all probate matters are primarily administrative, and may therefore be dealt with by Congress, presumably because it is a legislature (appellant's brief, pp. 22-27, 31-33). Congress admittedly has legislative power with respect to the enumerated and implied powers. The States have all other legislative power by virtue of article X of the Amendments to the Constitution (with the exception of those powers expressly forbidden to the States by article I, section 10). The two are not coordinate except in so far as Congress may act to prevent the States from

using their "characteristic" powers to injure or to discriminate against some phase of the exercise of an admitted Congressional power. The mere fact that a state legislature may pass a legislative act (as opposed to a judicial determination) does not mean that Congress may also pass the same act. The argument of the appellant distorts the reasoning in the opinion below (1928 Mass. Adv. Sh. 1213, 1224; R. 15, 26, *et seq.*) that the disputed language in section 1 of the Act of February 25, 1927 (as construed below), results in an exercise of judicial power by a legislative body. The only legislature competent to act directly upon the subject of the administration of estates in Massachusetts is the Great and General Court of the Commonwealth. That legislature has declared certain determinations to be judicial in nature. When Congress, a legislative body, purports to deal with these determinations the unconstitutionality of the action rests primarily, not upon the interference of a legislative body with a judicial matter, but upon the interference of an incompetent legislative body in a matter beyond its powers except in some indirect and incidental respects.

Summary of Argument upon the Constitutionality of Section 1 of the Act of February 25, 1927.

The following propositions we believe to be unquestioned law:

1. Congress has power to join to the banking function of national banks all forms of business done by state institutions competing with national banks.

2. Primarily the whole subject of the administration of estates is a matter reserved to the several States, but—

(*a*) In so far as Congress, in the exercise of one of the enumerated or implied powers, directly affects the administration of estates, as *e.g.* the Federal Estate Tax, Federal interference is valid.

(*b*) In so far as the States permit competitors of Federal agencies to perform duties in connection with the administration of estates, Congress may provide that its agencies, more particularly national banks, shall not be deprived of an opportunity to compete.

3. Where Congressional interference with the administration of estates rests upon the preservation of the right of national banks to compete with state agencies, the power of Congress is limited to preservation of the right of national banks to compete upon a parity with state institutions.

The fourth proposition for which we contend as deciding this case is—

4. Where a national bank is exercising an incidental power (as outlined in 2 (*b*) and 3, *supra*), it must do so subject to all non-discriminatory state law and supervision pertinent to the exercise of the power.

5. The particular state regulation here in issue does not discriminate against national banks in favor of any other person, but is applied to all persons evenly. So far as section 1 of the Act of February 25, 1927, interferes with non-discriminatory Massachusetts probate law, section 1 is invalid.

CONCLUSION.

We contend, therefore—

(1) That section 1 of the Act of February 25, 1927, should be construed as permitting consolidated national banks to succeed to the court appointments as fiduciary held by state trust companies party to the consolidation, only so far as non-discriminatory state law permits and subject to the non-discriminatory provisions and procedural requirements of state probate law.

(2) That, if the construction of section 1 taken by the Supreme Judicial Court of Massachusetts be adopted by

this Court, section 1 as thus construed should be held to be an unconstitutional interference by Congress with matters the control of which is reserved to the several States, so far as section 1 purports to authorize or to require succession of consolidated national banks as fiduciary in contravention of or without compliance with non-discriminatory provisions of state law.

We submit that the final decree of the Probate Court for the County of Worcester, Massachusetts, should be affirmed.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General of Massachusetts,

F. DELANO PUTNAM,
Assistant Attorney General of Massachusetts,

R. AMMI CUTTER,
Assistant Attorney General of Massachusetts.

APPENDIX A.

Section 11 (*k*) of the Federal Reserve Act, as amended by section 2 of the Act of September 26, 1918 (40 STAT. AT L., pt. 1, pp. 968-969):

"SEC. 2. That section eleven (k) of the Federal reserve Act be amended and reenacted to read as follows:

"(*k*) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

"National banks exercising any or all of the powers enumerated in this subsection shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

"No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

"Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

"National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

"National banks shall have power to execute such bond when so required by the laws of the State.

"In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

"It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to

whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

"In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers."

APPENDIX B.

General Laws of Massachusetts, c. 193, §7, as amended by St. 1921, c. 64:

"SECTION 7. If no executor is named in a will, or if all the executors therein named are dead or incompetent or refuse to accept the trust, or if, after being duly cited therefor, the executor neglects to accept the trust, or if he neglects for thirty days after the probate of the will to give bond according to law, the court shall commit administration of the estate, with the will annexed, to any person interested in the will of said deceased, to any creditor of the deceased or to any suitable person; but after the expiration of said thirty days, and before letters of administration with the will annexed have been granted, the court may grant letters testamentary to any person named as executor who gives the bond required by law. If a person named as executor in a will petitions for the probate of the same and dies, declines or becomes unable to act before final decree is entered on said petition, any person interested in the will of said deceased, or any creditor of the deceased, or any suitable person, may, on petition, be allowed to enter and to prosecute the original petition for probate, to apply for letters of administration with the will annexed, and to act and proceed in any proposed compromise under sections fifteen and sixteen of chapter two hundred and four. If it appears that there are no known heirs or legatees or devisees under the will of the deceased, a public administrator of the county shall be appointed to the trust."

APPENDIX C.

General Laws of Massachusetts, c. 172, §§ 49-59 (§52 as amended by St. 1928, c. 128, §2):

"SECTION 49. Every such corporation acting under any provision of the following section or section fifty-two shall have a trust department in which all business authorized by said sections shall be kept separate and distinct from its general business.

"SECTION 50. A court of law or equity, or a court of probate and insolvency of the commonwealth, may direct that money or property under its control, or which may be paid into court by parties to any legal proceedings, or which may be brought into court by reason of an order or judgment, be deposited with such corporation, upon such terms and subject to such instructions as the court may prescribe. When money so deposited has remained unclaimed for more than ten years, the court may upon motion of the attorney general order and decree that it shall be paid over to the state treasurer to be held by him under the terms of said order or decree, and upon the entry of such order or decree the corporation shall pay over money so deposited and specified in the order to the state treasurer, to be held by him as aforesaid; and if any person shall establish a lawful right thereto the said treasurer shall repay the same to such person, with interest at the rate of three per cent per annum from the time when paid to said treasurer to the time when it is paid over by him to such person. Sections forty-two and forty-three of chapter one hundred and sixty-eight shall be applicable to trust companies. Such corporation may also hold money or property in trust or on deposit from executors, administrators, assignees, guardians, conservators and trustees, upon such terms and conditions as may be agreed upon.

"SECTION 51. Money or property received under the preceding section shall be loaned on or invested only in

the authorized loans of the United States, or any of the New England states, counties, cities or towns thereof, or of the states of Illinois, Iowa, Michigan, Minnesota, Wisconsin, or the counties or cities thereof, or stocks of state or national banks situated within this commonwealth, or in the first mortgage bonds of a railroad corporation incorporated in any of the New England states whose road is located wholly or in part in the same and which has earned and paid regular dividends on all its issues of capital stock for two years last preceding such loan or investment, or in the bonds of any such railroad company unencumbered by mortgage, or in first mortgages on real estate in this commonwealth, or in any securities in which savings banks may invest, or upon notes with two sureties of domestic manufacturing corporations or of individuals with a sufficient pledge as collateral of any of the aforesaid securities; but all real estate acquired by foreclosure of mortgage or by levy of execution shall be sold at public auction within two years after such foreclosure or levy.

"Section 52. Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. Any such appointment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or section fifty without its assent. The words 'such corporation' as used in this section and in sections fifty-three to fifty-nine, inclusive, shall, so far as applicable, include any banking association or corpo-

ration holding a certificate under section forty-five A of chapter one hundred and sixty-seven.

"SECTION 53. Every such corporation may invest the funds or assets which it may receive and hold under the preceding section in the same way, to the same extent, and under the same restrictions as an individual holding a similar position may invest such funds or assets.

"SECTION 54. Money, property or securities received, invested or loaned under the provisions of sections fifty to fifty-two, inclusive, shall be a special deposit in such corporation, and the accounts thereof shall be kept separate. Such funds and the investment or loans thereof shall be specially appropriated to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to such corporation, or be liable for the debts or obligations thereof.

"SECTION 55. The capital stock of such corporations, with the liabilities of the stockholders thereunder, shall be held as security for the faithful performance of the duties undertaken by virtue of sections fifty to fifty-two, inclusive, or of any similar provision of law.

"SECTION 56. No such corporation shall commence to exercise the powers and duties described in sections fifty to fifty-two, inclusive, until it has received written authority therefor from the board of bank incorporation, and said board may grant or refuse such authority after such investigation of the affairs of the corporation as it deems expedient.

"SECTION 57. In all proceedings in the probate court or elsewhere, connected with any authority exercised under section fifty or fifty-two, or under any similar provisions of law, all accounts, returns and other papers may be signed and sworn to, in behalf of the corporation, by any officer thereof duly authorized by it, and the answers and examinations under oath of said officer shall be received

as the answers and examinations of the corporation. The court may order and compel an officer of such corporation to answer and attend said examination in the same manner as if he, instead of the corporation, were a party to the proceeding.

"SECTION 58. No surety shall be required upon the bonds filed by such corporation as fiduciary under section fifty-two except that the court making an appointment under said section, other than of a trustee, may, upon application by an interested person, require the corporation so appointed to give such security, in addition to that provided by section fifty-five, as the court may consider proper, and upon failure of such corporation to give the security required, may revoke such appointment and remove such corporation.

"SECTION 59. A person creating a trust may direct whether money or property deposited under it shall be held and invested separately or invested in the general trust fund of the corporation; and such corporation acting as trustee shall be governed by directions contained in the will or instrument under which it acts."

APPENDIX D.

General Laws of Massachusetts, c. 156, §§ 42 and 46:

"SECTION 42. Every corporation may, at a meeting duly called for the purpose, by vote of two thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association or act of incorporation so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their preferences and voting power, or make any other lawful amendment or alteration in its agreement of association or articles of organization, or in the corresponding provisions of its act of incorporation, or authorize the sale, lease or exchange of all its property and assets, including its good will, upon such terms and conditions as it deems expedient.

* * * * * * * * * *

"SECTION 46. A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with section forty-two, who, at the meeting of stockholders, has voted against such action may, within thirty days after the date of said meeting, make a written demand upon the corporation for payment for his stock. If the corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered in contract by the stockholder from the corporation. Upon payment by the corporation to the stockholder of the agreed or awarded price of his stock, the stockholder shall

forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation."

APPENDIX E.

To the Honorable the Judges of the Probate Court in and for the County of Worcester:

Respectfully represents *X Trust Company* of *X* in the County of Worcester, that the will of *John Doe* late of *Worcester* in said County of Worcester, deceased, was duly proved and allowed on the *tenth* day of *January* A.D. *1920*, in said Court, and that *the Y Trust Company was* appointed executor thereof, and that said executor has *ceased to do business* without having fully executed said will and that your petitioner is *its successor by consolidation under the provisions of G.L. c. 172 § 44 as amended by St. 1922, c. 292*

Wherefore your petitioner pray that *it*, or some other suitable person, be appointed administrator with the will annexed of the estate of said deceased not already administered, *and Richard Roe, its trust officer, hereunto duly authorized* certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *10th* day of *January* A.D. 1929.

THE X TRUST COMPANY
(sgd) by Richard Roe, Trust Officer

Worcester, ss. Subscribed and sworn to this *10th* day of *January* A.D. 1929.

Before me,

Justice of the Peace.

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

(Note: The words above in italics are inserted by us to show an appropriate method of filling out the form of petition for appointment as administrator *de bonis non* with the will annexed.)

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss.

PROBATE COURT.

To the devisees, legatees, and all other persons interested in the estate of late of in said County, deceased, testate:

Whereas, a petition has been presented to said Court to grant a letter of administration with the will annexed, on the estate of said deceased not already administered, to of in the County of Worcester, or to some other suitable person.

You are hereby cited to appear at a Probate Court to be held at Worcester, in said County of Worcester, on the day of A.D. 192 , at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And said petitioner is hereby directed to give public notice thereof by publishing this citation once in each week, for three successive weeks, in the a newspaper published in the last publication to be one day, at least, before said Court, and by mailing, postpaid, or delivering a copy of this citation to all devisees and legatees named in said will, seven days at least before said Court.

Witness, FREDERICK H. CHAMBERLAIN, Esquire, First Judge of said Court, this day of in the year one thousand nine hundred and twenty.

Register.

I have served the foregoing citation as therein ordered by publishing and mailing—delivering.

WORCESTER, ss. _____ A.D. 192 . Then personally appeared _____ and made oath that the above return by h subscribed is true.

Before me,

_____ Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss.

At a Probate Court holden at Worcester _____ in and for said County of Worcester, on the _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

On the petition of _____ of _____ in the County of Worcester, _____ praying that he , or some other suitable person, be appointed administrat with the will annexed, of the estate not already administered, of _____ late of _____ in said County of Worcester, _____ deceased, _____ it appearing that the will of said deceased was duly proved and allowed, on the _____ day of _____ A.D. 1 , by said Court and that _____ w appointed execut _____ thereof, and _____ ha since _____ without having fully executed said will. All persons interested _____ having been notified according to the order of Court, and no person objecting thereto:

It is decreed that said petitioner _____ be appointed administrat with the will annexed, of said estate not already administered, he first giving bond with _____ sufficient sureties for the due performance of said trust.

_____ Judge of Probate Court.

APPENDIX F.

Massachusetts Acts of 1911, c. 128 (sections pertinent to this case only. Sections 2, 4, 5, 6, and 7 not printed):

"SECTION 1. The Old Colony Trust Company, the Massachusetts Trust Company, the Mercantile Trust Company and the City Trust Company may apply to the board of bank incorporation for authority to merge, and if the board shall grant such authority the respective boards of directors of said trust companies may make an agreement for the merger of the Massachusetts Trust Company, the Mercantile Trust Company and the City Trust Company in the Old Colony Trust Company, prescribing the terms and conditions thereof and the mode of carrying the same into effect, which agreement shall be subject to the approval of the bank commissioner.

* * * * * * * * *

"SECTION 3. *No such merger shall work a dissolution of any of said trust companies or a termination of their several corporate existences or of their franchises*, but the corporate existence of each trust company so merged shall be continued by the Old Colony Trust Company, and all their privileges and franchises and all their rights, titles and interests in and to any species of property and things in action shall forthwith without any deed or transfer be vested in said Old Colony Trust Company to hold and enjoy in the same manner and to the same extent as the said trust companies so merged had formerly held and enjoyed the same; but the several merged trust companies may in their discretion execute one or more deeds or instruments of conveyance transferring or confirming all their rights, titles and interests aforesaid to the Old Colony Trust Company. The rights of creditors of any trust company so merged shall not in any manner be impaired by any such merger, and the Old Colony Trust Company shall upon such merger continue to exercise and be subject to

all the duties, relations, obligations, trusts and liabilities of such merged trust companies whether as debtor, depositary, registrar, transfer agent, executor, administrator, trustee or otherwise, and be held liable to pay and discharge all such debts and liabilities, and to perform all such duties and trusts, in the same manner and to the same extent as if said Old Colony Trust Company had itself incurred the obligation or liability or assumed the duty, relation or trust, and no suit, action or other proceeding then pending before any court or tribunal in which any trust company that may be so merged is a party shall be deemed to have abated or to have been discontinued by reason of such merger." (Italics ours.)

* * * * * * * * *

APPENDIX G.

Regulation F (in part), Series of 1928, published in Fourteenth Annual Report of the Federal Reserve Board, 1927, p. 286 *et seq.*

"The purpose of this provision is to make clear the right of such a consolidated national bank to succeed to the specific trusteeships, executorships, and other fiduciary appointments under which the State institution was acting prior to the consolidation or in which it had been appointed or designated to act under wills or other instruments which had not become effective at the time of consolidation through the death of a testator, the probate of a will, or otherwise; *but it does not confer upon such national banks the right to act generally in fiduciary capacities or to undertake any new trust business. It is necessary for the consolidated national bank to have a permit from the Federal Reserve Board to act in fiduciary capacities, therefore, before undertaking to act generally in fiduciary capacities or to accept any new trust business.* If the national bank does not desire to act generally in fiduciary capacities or to accept any new trust business, but desires merely to continue to execute the specific trusteeships, executorships, and other fiduciary affairs which were actually being executed by the State institution at the time of the consolidation or which the State institution had been designated to execute under wills or other instruments which had not yet become effective through the death of the testator, the probate of the will, or otherwise, it is not technically necessary for the national bank to have a permit from the Federal Reserve Board in order to execute such specific trusts; but it is advisable for the national bank to have such a permit, in order that its right to continue to execute these trusts may not be questioned. In all cases involving the consolidation of a State institution

having a trust business with a national bank under the provisions of the above-mentioned act, therefore, the national bank should obtain from the Federal Reserve Board a permit to act in fiduciary capacities before the consolidation becomes effective, unless such national bank already has such a permit." (Italics ours.)